

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

MDL NO. 2804

CASE NO. 17-md-2804

Hon. Dan A. Polster

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

THIS DOCUMENT RELATES TO:

TRACK THREE CASES

VOLUME II

REMOTE VIDEO DEPOSITION OF

JAMES RAFALSKI

June 11, 2021

REPORTED BY: Laura H. Nichols

Certified Realtime Reporter,

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1 PROCEEDINGS CONTINUING, VOLUME II

2 June 11, 2021

3 8:04 a.m. EDT

4  
5 THE VIDEOGRAPHER: Good morning.

6 Today is June 11th, 2021. We are on the record at  
7 8:04 a.m. Today we will take a videotaped  
8 deposition in Case Number 17-md-2804. This  
9 deposition is being held remotely. Would you  
10 please swear the witness?

11  
12 JAMES RAFALSKI,

13 having been previously duly sworn, was examined and  
14 testified further as follows:

15  
16 EXAMINATION BY MR. LIVINGSTON, CONTINUING:

17 Q. All right. Good morning,  
18 Mr. Rafalski. As you know, my name is Scott  
19 Livingston. I started off with the questioning.  
20 And I guess I am batting cleanup, although my  
21 colleagues may have some additional questions when  
22 I am finished.

23 Did you have the opportunity to speak  
24 with counsel yesterday at all about your  
25 deposition?

1           A.       I did not.

2           Q.       Did you speak with anyone about your  
3 deposition?

4           A.       I did not, other than my wife asked  
5 how it went.

6           Q.       Other than that, no one?

7           A.       No one.

8           Q.       All right. Do you have the Giant  
9 Eagle exhibit binder in front of you?

10          A.       I do. Before we get started,  
11 Mr. Livingston, can I -- there's a couple of things  
12 I would like to say. Before --

13          Q.       Wait, no. No. You can save those  
14 for when your counsel is asking you questions.

15                   I would like to have you turn to your  
16 report, which is Exhibit 2. I think we talked a  
17 little bit yesterday about how important it was for  
18 you to do your due diligence before you published  
19 your report.

20          A.       Yes, sir.

21          Q.       And how it was really important to  
22 make sure that it was accurate and thorough.

23          A.       Yes, sir.

24          Q.       And that all of the important things  
25 that you needed to look at, it was important for

1 you to actually look at those things and identify  
2 them in your report, correct?

3 A. I believe that is an accurate  
4 statement, Mr. Livingston.

5 Q. And one of those things would be  
6 Mr. Tsipakis's deposition, correct?

7 A. Yes, sir.

8 Q. And who is Mr. Tsipakis?

9 A. He was the 30(b) witness for Rite  
10 Aid -- I mean, I'm sorry, Giant Eagle. I'm sorry.

11 Q. Yeah, wrong guess.

12 A. Not a guess, sir.

13 Q. He was the 30(b)(6) witness for Giant  
14 Eagle in this matter, correct?

15 A. That's correct.

16 Q. Which means he was designated by  
17 Giant Eagle to speak on behalf of the whole  
18 company; is that correct?

19 A. That is how I understand a 30(b),  
20 sir.

21 Q. And you know from reading his  
22 deposition that he is, in fact, in charge of all of  
23 Giant Eagle's pharmacy operations, correct?

24 A. I believe that is what the deposition  
25 indicates, yes, sir.

1           Q.       Yes. And you cited his deposition in  
2 a number of places in your report; is that correct?

3           A.       That's correct, sir.

4           Q.       Would you turn to your Schedule I,  
5 which identifies the documents and things that you  
6 reviewed? And specifically, I would like to direct  
7 your attention to Page 42 of your schedule. Do you  
8 see at the bottom there that there are a number of  
9 depositions listed that you reviewed?

10          A.       Yes, sir.

11          Q.       And you list Mr. Tsipakis's  
12 December 13, 2018, deposition, correct?

13          A.       Yes, sir.

14          Q.       And did you read that deposition  
15 thoroughly and entirely?

16          A.       Yes, sir.

17          Q.       You do not list Mr. Tsipakis's  
18 30(b)(6) deposition that he gave in this case,  
19 correct?

20          A.       I'm confused by that. I read a 30(b)  
21 deposition for Mr. Tsipakis. I don't recall being  
22 30 -- two 30(b)s.

23          Q.       Right. Maybe that was because your  
24 counsel didn't alert you to that. But do you see  
25 the date of this Tsipakis deposition?



1           A.       I do.

2           Q.       Okay. That deposition was given in  
3 Track 1, correct?

4           A.       The date would indicate that.

5           Q.       Yes. And we are now in Track 3,  
6 correct?

7           A.       That's correct.

8           Q.       And discovery in Track 3 had not even  
9 begun when this December 2018 deposition of  
10 Mr. Tsipakis was taken, correct?

11          A.       That's correct.

12          Q.       So can you confirm for me on the  
13 record that you did not review Mr. Tsipakis's  
14 30(b)(6) deposition that he gave in this case,  
15 which is the Lake and Trumbull County case against  
16 the pharmacy chain defendants?

17                   MS. KNIGHT: Objection to form.

18          A.       Mr. Livingston, I don't have any  
19 notes here with me from my review of the  
20 deposition, so I'm a little hesitant to confirm  
21 that without looking at the notes to confirm that  
22 date of the deposition I read.

23          Q.       (BY MR. LIVINGSTON:) Well, actually  
24 you do have notes. Why don't you turn to  
25 Walmart Exhibit -- what was marked yesterday as

1 Walmart Exhibit 1, which was your cheat sheet for  
2 each of the various defendants in this case.

3 A. Okay.

4 Q. And you did list Mr. Tsipakis's 30(b)  
5 deposition. You thought it was important enough to  
6 actually list that on your cheat sheet, correct?

7 A. It is on here. I just do not know  
8 the date of the deposition. That is not listed  
9 there, Mr. Livingston.

10 Q. Well, when we take a break, I am  
11 going to ask you to review closely your entire  
12 schedule. Because I know I am getting up in age,  
13 but I couldn't see it. And I have reviewed it  
14 several times. I saw no indication either in the  
15 body of your report or in your schedule that you  
16 even glanced at Mr. Tsipakis's lengthy two-day  
17 deposition in Track 3. Would you --

18 MS. KNIGHT: Object to form.

19 Q. (BY MR. LIVINGSTON:) Would you -- I  
20 think in your cheat sheet you also indicate, you  
21 have written down that Giant Eagle could not block  
22 orders. It is at the bottom of the second heading  
23 there. You see that? "Did not block orders." Was  
24 that a material fact that you considered when you  
25 rendered your opinion that Giant Eagle's SOMS

1 system was subpar?

2 MS. KNIGHT: Mr. Livingston, I'm so  
3 sorry. You were frozen, so we didn't hear anything  
4 up until just this moment when you came back.

5 MR. LIVINGSTON: Okay.

6 Q. (BY MR. LIVINGSTON:) Well, let me  
7 back up. So do you see where you indicate in  
8 your -- on your cheat sheet that Giant Eagle SOMS  
9 system did not block orders? Do you see that?

10 A. Yes, sir.

11 Q. Okay. Was that fact material to your  
12 opinion that Giant Eagle's SOMS system was subpar?

13 A. During that time period, with that  
14 statement, yes, sir, that was part of my opinion.

15 Q. All right. Why don't you go to the  
16 body of your report, in Exhibit 2, Page 154. Do  
17 you see on the second -- beginning of the second  
18 full paragraph, there's a statement, "The threshold  
19 system did not block orders." Did you see that or  
20 do you see that?

21 A. Yes, sir.

22 Q. Okay. Is that what you were  
23 referring to on your cheat sheet when you said  
24 Giant Eagle's system did not block orders?

25 MS. KNIGHT: Objection to the form.

1           A.       Yes, sir.

2           Q.       (BY MR. LIVINGSTON:) Would you go to  
3 Exhibit 53 in Giant Eagle's binder?

4           MS. KNIGHT: Exhibit 53. Okay.

5                   (GE Exhibit 53 was marked for  
6 identification.)

7           A.       I am there, sir.

8           Q.       (BY MR. LIVINGSTON:) All right. Do  
9 you see that there's an email at the bottom from  
10 Brandon Heckman at Giant Eagle to a number of other  
11 folks within the company, including a number of  
12 folks who are in the pharmacy department? Do you  
13 recognize these names?

14          A.       Some of them, sir.

15          Q.       Okay. And you see that it is dated  
16 July 7, 2014.

17          A.       I do.

18          Q.       Okay. And do you see that the  
19 indication here for importance is high? Do you see  
20 that?

21          A.       Yes, sir.

22          Q.       Okay. I am going to -- bear with me.  
23 I am going to read part of this email. It says,  
24 "Tonight we had a task come across for RX4031 that  
25 called for an entire case of item 144535 to be

1     picked. The item is a controlled substance, so we  
2     will not be shipping this until it is verified that  
3     this is what the store should actually be  
4     receiving.

5                     "While the quantity requested of this  
6     item may be due to the holiday weekend, we would  
7     like this order to be investigated before shipping.  
8     I have left the case sitting in the reserve until  
9     it is verified that it is okay to ship the item."

10                    Doesn't this email pretty clearly  
11     indicate to you that Giant Eagle at this point in  
12     time was using a SOMS system that did, in fact,  
13     identify potentially suspicious orders and block  
14     them before they were shipped?

15                    A.     Mr. Livingston, I think this email  
16     obviously indicates that that order was held. I  
17     don't know that it indicates to me that it was  
18     blocked by the SOMS system. In regards to the  
19     portion of my report that we are discussing, that  
20     was based on a statement from Mr. -- the 30(b),  
21     Mr. Tsipakis. This -- I acknowledge that this  
22     order is being held, but I don't see that it  
23     would -- it is held specific to the SOMS system.

24                    Q.     Well, do you think it was -- are you  
25     suggesting to the jury that it was just by pure

1 accident that this order happened to be identified  
2 as an order that should be blocked and investigated  
3 before it was shipped?

4 A. No. I will acknowledge it is being  
5 held bill the company. But I don't know that it is  
6 being specifically blocked by the SOMS system.  
7 There could have been many other reasons why  
8 something would trigger it to be stopped by the  
9 company.

10 I am just stating to you that this  
11 doesn't acknowledge to me that this was specific to  
12 the SOMS.

13 Q. But this is a controlled substance,  
14 sir. This is not an order of aspirin, correct?

15 A. Well, I agree it is a controlled  
16 substance order.

17 Q. Right. And the controlled substance  
18 is being blocked because obviously there's a  
19 suggestion here that the order was larger than  
20 usual, and the suggestion is perhaps it was due  
21 because -- due to the holiday weekend. But they  
22 are not going to assume that. They are going to  
23 investigate it before they let it go, correct?

24 A. It does say all of those things, sir.

25 Q. And then if we go to the email at the

1 top, in response it says, "Please send the rest of  
2 this order. I called the pharmacy. They have  
3 several owes and need this medication. They  
4 received three bottles in today's order. Thank  
5 you."

6 So you see that this email chain  
7 reveals not only that an order was blocked after  
8 being identified as too -- potentially too large,  
9 it was investigated and ultimately released. Do  
10 you see that?

11 A. That is what this email indicates. I  
12 agree with that. I'm not so sure I agree that it  
13 is a sufficient reason to release, but that is not  
14 part of your question.

15 Q. But what troubles me, sir, is I  
16 reviewed your entire schedule of documents that you  
17 reviewed, and I no know indication that you  
18 reviewed this document. Why not, sir?

19 MS. KNIGHT: Objection to form.

20 A. Other than when I was searching,  
21 maybe I didn't locate it. I don't have an  
22 explanation, Mr. Livingston.

23 Q. (BY MR. LIVINGSTON:) Okay. You  
24 would agree that this is something you should have  
25 looked at and considered before you rendered your

1 opinion?

2 MS. KNIGHT: Objection to form.

3 A. I think any -- I think any document  
4 is relevant, Mr. Livingston. This particular  
5 document wouldn't have changed my statement in my  
6 report about the blocking of the orders.

7 Q. (BY MR. LIVINGSTON:) You wouldn't  
8 have even dropped a footnote and said well, with  
9 the exception of one email that, you know, I  
10 happened to come across, or would you just tell the  
11 jury that there was never, ever an order blocked by  
12 Giant Eagle's system --

13 MS. KNIGHT: Object to the form.

14 Q. (BY MR. LIVINGSTON:) -- despite the  
15 fact -- despite the fact -- let me finish my  
16 question -- despite the fact that this email makes  
17 it perfectly clear that they did block orders?

18 MS. KNIGHT: Objection to form.

19 A. Again, I concede they blocked an  
20 order. This email doesn't -- would be different  
21 than the statement made by Mr. Tsipakis. And  
22 secondly, it doesn't indicate to me that it was  
23 blocked by the SOMS.

24 Q. (BY MR. LIVINGSTON:) Do you have any  
25 earthly idea sitting under oath today for your



1 deposition what the basis of this order being  
2 blocked was, other than Giant Eagle's SOMS system?

3 MS. KNIGHT: Objection to form.

4 Q. (BY MR. LIVINGSTON:) Are you just  
5 going to -- you're going to sit there and just  
6 throw out some guesses for us?

7 MS. KNIGHT: Objection to form. And  
8 that is an entirely inappropriate question.

9 MR. LIVINGSTON: No, it is not  
10 inappropriate because it is clear --

11 Q. (BY MR. LIVINGSTON:) Do you have any  
12 basis at all for telling the jury that this was not  
13 blocked pursuant to Giant Eagle's existing SOMS  
14 system back in 2014?

15 A. I will repeat my answer earlier. I  
16 read the email and acknowledge it is being held by  
17 the company. There's nothing in here that  
18 definitively tells me it was blocked by the SOMS  
19 system.

20 Q. Right. And there's nothing  
21 definitively in here that tells you that it was not  
22 blocked by the SOMS system, right?

23 A. That's correct.

24 Q. While we are on the topic of due  
25 diligence in connection with your expert report,

1 one of the things that you did not investigate  
2 before you rendered your opinion that somehow the  
3 defendants contributed substantially to the opioid  
4 crisis in Lake and Trumbull County was what impact,  
5 if any, bad doctors had on the opioid crisis in  
6 those two counties, correct?

7 A. Generally, that is correct, sir.

8 Q. And I won't replot old territory from  
9 yesterday, but I think you did acknowledge that you  
10 did not review any of the Ohio Board witness  
11 deposition transcripts, correct?

12 A. That is a correct statement. That is  
13 what I stated yesterday, sir.

14 Q. Would you go, turn to Exhibit --  
15 Giant Eagle Exhibit 15?

16 (GE Exhibit 15 was marked for  
17 identification.)

18 Q. (BY MR. LIVINGSTON:) And just the  
19 first page, just to orient you -- and again, I know  
20 that you didn't review this. You just  
21 acknowledged --

22 A. One second, sir. One second.

23 (Pause.)

24 A. Okay. I am there.

25 Q. (BY MR. LIVINGSTON:) All right. You

1 see on Page 1 here, this is basically we didn't  
2 want to kill trees, we didn't provide the whole  
3 deposition but just some of the parts that we  
4 thought we might want to ask you questions about.

5 But this was Mr. George Pavlich, who  
6 was a long time Ohio Board of Pharmacy agent who  
7 worked in Lake and Trumbull Counties. And his  
8 deposition was taken in this matter on December 14,  
9 2020.

10 Could you turn to Page 184 and 185?

11 At the very bottom of 184,  
12 Ms. Pavlich was asked about another Ohio Board  
13 agent. "Was there a problem or an issue about why  
14 Agent Bodi did not investigate Dr. Franklin?" And  
15 he responded, "Not everybody is capable of doing an  
16 extensive massive doctor investigation. I just  
17 happened to be really good at it. I had already  
18 indicted and convicted probably fifty doctors,  
19 including the Mahoning County Coroner."

20 Did you know that just this one board  
21 agent alone had put behind bars fifty bad doctors  
22 in these two counties who were writing bad scripts?

23 MS. KNIGHT: Objection to form.

24 A. I acknowledge the fifty. I don't  
25 know that it is the two -- it is Lake and Trumbull

1 Counties, sir.

2 Q. (BY MR. LIVINGSTON:) You don't know  
3 where Mahoning County is?

4 A. No. You said the two bad counties,  
5 and that wouldn't be Lake or Trumbull.

6 Q. You know Mahoning County is  
7 borders --

8 A. I do.

9 Q. You got that geography right. So it  
10 was in that neck of the woods, right?

11 MS. KNIGHT: Object to the form.

12 A. Yes. But in reading this deposition,  
13 this two pages, I don't know that that answer is  
14 specific to the two counties, but I acknowledge it  
15 is fifty doctors.

16 Q. (BY MR. LIVINGSTON:) And we -- that  
17 is a lot. I mean do you know what the demographics  
18 are for these two counties? Aren't they pretty  
19 small, relatively rural counties?

20 A. We are talking Trumbull and Lake?

21 Q. Yes.

22 A. Lake is small in square miles, but I  
23 believe the population is larger than Trumbull.

24 Q. I mean, when you add them up, aren't  
25 they only in the neighborhood of the four hundred

1 thousand or so?

2 A. No, I think they are much higher than  
3 that. I think -- it has been a while since I  
4 looked and reviewed, but I think it is more around  
5 eight hundred thousand for combined.

6 Q. You must have a different Google map  
7 than I do. But in any event, let's look at  
8 Page 186 and 187 of Mr. Pavlich's deposition. Did  
9 you -- well, let me ask you this: In preparing  
10 your report, did you come across Dr. Franklin's  
11 name?

12 A. I did.

13 Q. You know he was a bad doctor, right?

14 A. The Google information I read would  
15 indicate that, yes. If that is the Dr. Franklin  
16 that was murdered by his wife, then, yes.

17 Q. So you did -- did you do any research  
18 on Dr. Franklin in connection with preparing your  
19 report?

20 A. Well, yes. I looked up and I tried  
21 to identify some of the -- that there were some  
22 doctors in the Lake and Trumbull area, there were  
23 bad doctors present through looking through Google  
24 and reading some releases by the Ohio Attorney  
25 General.

1 But I didn't specifically investigate  
2 Dr. Franklin's prescribing, if that is the question  
3 you are asking.

4 Q. Okay. So previously I thought you  
5 just told me this morning that you had not tried to  
6 investigate to see what the impact of the bad  
7 doctors writing bad scripts in Label and Trumbull  
8 Counties were on the opioid crisis. But yet you  
9 did do some research on these doctors? Is that  
10 what you are telling us?

11 A. Only in to identify the existence of  
12 some doctors that had been under investigation,  
13 indicted or identified through a Google search.  
14 That is correct.

15 Q. But for what purpose? Why were you  
16 trying to identify them?

17 A. Predominantly, I was looking in the  
18 areas of pharmacies that had high prescribing to  
19 see if some of these doctors had offices specific  
20 to those areas. Another one -- that would be the  
21 general reason. And just that they existed.

22 There was -- I recall reviewing an  
23 Attorney General press release that gave a  
24 number -- a number of doctors and pharmacies that  
25 had been -- lost their medical license. So I did

1 some further review to see if I could identify any  
2 of these doctors. The document didn't list any  
3 names.

4 Q. Well, you said that you were looking  
5 at these doctors in connection with -- to see if  
6 they were located near any of the high volume  
7 pharmacies; is that correct?

8 A. Yes, sir.

9 Q. And when you said "high volume  
10 pharmacies," are you referring to any of the  
11 pharmacies owned and operated by the defendant  
12 pharmacies?

13 A. Yes, that would be one of the  
14 purposes.

15 Q. Okay. So you did try to do an  
16 analysis to see if a lot of these bad doctors'  
17 scripts were being filled by any of the defendant  
18 pharmacies; is that correct?

19 MS. KNIGHT: Object to the form.

20 A. I did not have the ability to do that  
21 in-depth of an analysis because I did not have  
22 prescribing records. My interest or goal was just  
23 to see if I could identify some of the doctors that  
24 were in those two counties that were engaged with  
25 issuing a list of prescriptions.

1           Q.       (BY MR. LIVINGSTON:) All right. So  
2       you did some analysis and you identified at least  
3       some doctors. Why are they not mentioned in your  
4       report?

5                   MS. KNIGHT: Object to the form.

6           A.       Because I didn't have sufficient  
7       information in discovery or provided to me to link  
8       them to the actual prescriptions at those  
9       pharmacies.

10          Q.       (BY MR. LIVINGSTON:) Well, you know,  
11       sir, don't you, that there was a big food fight  
12       about whether the defendants would have to produce  
13       their prescription data and ultimately they did  
14       provide that information and ultimately the OARRS  
15       data for these two counties was produced by the  
16       Ohio Board of Pharmacy? Are you aware of those  
17       facts?

18                  MS. KNIGHT: Object to the form.

19          A.       I have heard general conversations on  
20       that matter, but I wasn't asked to provide an  
21       opinion on the prescribing and dispensing at the  
22       pharmacy level. Mine was just purely interest on  
23       just the doctors present in these two counties as  
24       just part of just reviewing some materials.

25          Q.       (BY MR. LIVINGSTON:) My memory is



1 not what it used to be, but you just said in  
2 response to the earlier, the previous question that  
3 the reason why you didn't -- you weren't able to  
4 analyze whether these doctors' scripts were being  
5 filled by my client and some of the other  
6 defendants in this case was because you didn't have  
7 the data available.

8 And that is just not true, right?  
9 The data, in fact, was available to you.

10 MS. KNIGHT: Objection to form.

11 A. It was not provided to me. It was  
12 not available to me. I was not asked to provide an  
13 opinion on that.

14 Q. (BY MR. LIVINGSTON:) Did you  
15 request, make a request to plaintiffs' counsel that  
16 they provide you with that data or with your  
17 assistant, Dr. McCann, that they provide that data  
18 to Dr. McCann?

19 MS. KNIGHT: Objection to form.

20 A. I did not ask for that data, sir.

21 Q. (BY MR. LIVINGSTON:) So you just  
22 assumed that the data wasn't available?

23 MS. KNIGHT: Objection to form.

24 A. No. Again, I wasn't asked to provide  
25 an opinion on the list of prescribing and

1 dispensing at the pharmacy level. I wasn't asked  
2 to do an analysis of the pharmacies, so it wasn't  
3 data that I requested. Because I did not need it  
4 because I was not doing an opinion on that matter.

5 Q. (BY MR. LIVINGSTON:) All right.  
6 Would you go to Page 187?

7 A. I am there.

8 Q. In the middle of that page, there's a  
9 question asked. "And in your search warrant, on  
10 the next paragraph you state that the review  
11 confirmed that Dr. Franklin authorized fifteen  
12 thousand two hundred ninety-eight controlled  
13 substance prescriptions during the period of 4-10  
14 of '06 through 6- 4 of '08, so a little more than  
15 two years, these fifteen thousand controlled  
16 substance prescriptions. Was that the time window  
17 that you had narrowed your investigation down to?"

18 "Yes."

19 So Mr. Pavlich is telling us that  
20 this one bad doctor alone during only a two-year  
21 period -- remember, this case, the period for this  
22 case goes from 2006 to the present. But this is  
23 only two of those years, one bad doctor writing  
24 fifteen thousand -- over fifteen thousand bad  
25 scripts. And you didn't factor this into your

1 report, did you?

2 MS. KNIGHT: Objection to form.

3 A. I did not.

4 Q. (BY MR. LIVINGSTON:) You also didn't  
5 factor into your analysis the effect that any  
6 internet pharmacies had on the opioid crisis in  
7 Lake and Trumbull County, correct?

8 A. That is correct.

9 Q. And that is despite the fact that you  
10 knew from your time with the DEA that a major  
11 contributor to the opioid crisis was internet  
12 pharmacies, correct?

13 A. I am well aware of the effect of the  
14 internet pharmacies. I don't know how it is  
15 relevant to Lake and Trumbull County unless you are  
16 indicating that maybe some of the residents there  
17 were utilizing ordering those prescriptions online.  
18 I'm not aware of any internet pharmacies that were  
19 located in Lake and Trumbull County during the time  
20 period of my review.

21 Q. Who said an internet pharmacy had to  
22 be located physically in the county? Isn't that  
23 the whole point, that you can just order on the  
24 internet and have the drugs delivered to you?

25 A. That is the point.

1 Q. Okay.

2 A. So that is why I made that -- that's  
3 why I gave that reply, because there would be no  
4 way for me to know what residents of those two  
5 counties ordered from the internet, other than if  
6 there was -- in doing my review, there was never  
7 any material that would provide me with that  
8 information.

9 Q. But you are not suggesting that Lake  
10 and Trumbull County residents didn't have the  
11 internet available to them during the relevant  
12 period, are you?

13 A. No. I think what I'm indicating,  
14 there's no way I would know that they utilized the  
15 internet to order internet opioid prescriptions and  
16 have it delivered to those specific counties. That  
17 information wouldn't be available to me.

18 Q. When you were with the Detroit office  
19 of the DEA, was Detroit considered a major drug  
20 supplier via drug gangs to neighboring states?

21 MS. KNIGHT: Objection to form.

22 A. Early in my career, I believe that  
23 would be a correct statement.

24 Q. (BY MR. LIVINGSTON:) When you say  
25 "early in your career," what do you -- what do you

1 mean by that? What time period are you talking  
2 about?

3 A. I would say 2004. And it would have  
4 been declining sometime prior to 2010. Maybe the  
5 first three or four years I think there was quite a  
6 bit of migration to a couple of different states.

7 Q. Well, one of those states was Ohio,  
8 correct?

9 A. Ohio primarily only because it was a  
10 bordering. But the actual illicit distribution in  
11 my investigations, what I was aware was  
12 predominantly it was mainly to Kentucky and then  
13 secondly to Tennessee.

14 Q. Well, were you aware that a lot of  
15 these Detroit-located drug gangs would pay elderly  
16 citizens to get opioid scripts filled in -- at  
17 Detroit pharmacies right down the street from your  
18 office and then travel on Greyhound buses and  
19 rented cars to Lake and Trumbull County to sell  
20 those drugs there because they could get more per  
21 pill than they could in Detroit? Were you aware of  
22 that problem?

23 MS. KNIGHT: Objection to form.

24 A. I did not work any cases that  
25 involved Lake and Trumbull County, and I did not

1 have any discussions from any investigators in that  
2 region of the country. All of my cases had links  
3 to, as I stated earlier, Kentucky and Tennessee.

4 I was aware that there was some  
5 bouncing back and forth across the state borders  
6 because the maps or the PMP programs didn't link  
7 between each state. But I'm not aware of any case  
8 that was worked out of the Detroit office that was  
9 specifically tied to those two counties.

10 Q. (BY MR. LIVINGSTON:) Well, one thing  
11 for sure we know from reading your report is that  
12 you did not take into consideration the impact that  
13 drug gangs had on selling illegitimately obtained  
14 opioid scripts in Lake and Trumbull County,  
15 correct?

16 A. No. My report, Mr. Livingston,  
17 focuses on the distribution from the distributor  
18 down to the pharmacy. My analysis doesn't focus on  
19 the illicit conduct outside of that action.

20 Q. Okay. And -- well, you also didn't  
21 review any of the law enforcement depositions that  
22 were taken in this case in which testimony was  
23 given that Detroit was a major supplier of  
24 illegally obtained opioid pills to Lake and  
25 Trumbull County, correct?

1 MS. KNIGHT: Object to the form.

2 A. I didn't review those reports. I  
3 would be interested to look at one if you have one  
4 available or in the binder.

5 Q. (BY MR. LIVINGSTON:) You -- I don't  
6 want to leave you in anticipation. Let's go to  
7 Exhibit -- Giant Eagle Exhibit 25.

8 (GE Exhibit 25 was marked for  
9 identification.)

10 Q. (BY MR. LIVINGSTON:) This is --  
11 Exhibit 25 is Ohio State Highway Patrol, Critical  
12 Information and Communications Center, Criminal  
13 Intelligence Unit, Issue Date -- and it has  
14 "Awareness: Prescription Drug Interdiction." And  
15 it is dated August 9, 2012. Do you see that?

16 A. I do.

17 Q. Okay. This is during the relevant  
18 time frame upon which your opinion is based,  
19 correct?

20 A. It is.

21 Q. Okay. Did you review this document  
22 in connection with the preparation of your report?

23 A. I don't recall looking at this  
24 specific document, sir.

25 Q. Okay. When you were a DEA agent,

1 would you sometimes receive these reports from  
2 neighboring law enforcement agencies?

3 A. I don't recall receiving specific  
4 Ohio. I might receive summaries that the DEA would  
5 produce relying on these type of documents. But I  
6 don't recall receiving anything from the Ohio State  
7 Patrol or having access to it when I was with the  
8 DEA.

9 Q. All right. And certainly in August  
10 of 2012, you were still in the DEA's Detroit  
11 office, correct?

12 A. I'm sorry. Could you say that one  
13 more time?

14 Q. Yes. I said and certainly when  
15 the -- the date of this -- on the date of this  
16 report, August of 2012, you were still at the DEA's  
17 Detroit office, correct?

18 A. That's correct.

19 Q. Okay. Under "Summary," if you skip  
20 down a little bit --

21 MS. KNIGHT: Mr. Rafalski, do you  
22 need time to review that?

23 A. Could I just have one more minute? I  
24 want to look at this before I respond to some of  
25 your questions. Could I just have a minute to read



1 it, Mr. Livingston?

2 (Pause.)

3 A. Okay. Go ahead. I'm sorry.

4 Q. (BY MR. LIVINGSTON:) Okay. So if we  
5 go down to the summary, it says, "Recently a  
6 multistate meeting was held at Ohio HIDTA to  
7 network and develop plans to help combat the  
8 prescription drug problem most prominently coming  
9 from the Detroit, Michigan area." Did the DEA --

10 MS. KNIGHT: Mr. Livingston, I'm  
11 sorry. Which page of the exhibit?

12 A. First page.

13 MR. LIVINGSTON: First page, cover  
14 page.

15 A. I see that.

16 Q. (BY MR. LIVINGSTON:) Okay. Did the  
17 DEA sometimes participate in these multistate  
18 meetings with other law enforcement agencies to  
19 deal with these kinds of drug problems?

20 A. I don't have any personal knowledge  
21 of them attending these meetings, but I knew that  
22 would be part of -- they had a HIDTA unit,  
23 intelligence unit, so I would expect they may. But  
24 I don't have any direct knowledge of whether they  
25 did or did not.

1           Q.       All right. It says, "The following  
2 pieces of intelligence were derived from the  
3 discussions: Greyhound bus lines are being used as  
4 a transportation method. The suspects usually  
5 travel late evening or early morning. Rental cars  
6 are often commonly used as a method of  
7 transportation.

8                    "In approximately fifty percent of  
9 large pill interdiction Ohio State Highway Patrol  
10 cases in the last year, suspects were driving  
11 rental cars and the suspects were not usually on  
12 the rental agreement."

13                   And then it talks about, gets into  
14 even more detail about the methods of concealment.  
15 "Women often conceal pills in their body cavities  
16 via condoms. Pills are commonly found in potato  
17 chip bags, fast food bags and have been found  
18 recently concealed in Subway sandwiches."

19                   "Types of narcotics seized." This is  
20 important. "The Ohio State Highway Patrol most  
21 predominately seizes OxyContin, oxycodone and  
22 hydrocodone. However, OPANA?, similar to morphine  
23 and codeine, are increasing in frequency."

24                   Now, those opioid drugs that are  
25 mentioned here, those are the drugs that your --

1 that your report focuses on with respect to the  
2 opioid crisis in Lake and Trumbull County, correct?

3 A. It is.

4 Q. Would you go to the next page? Bates  
5 number at the bottom, last five digits -- four  
6 digits, 7551.

7 A. I see that.

8 Q. And there's a big -- in bold it says,  
9 "Awareness: Prescription Drug Interdiction."  
10 Under "Marion, Ohio," second bullet point, it says,  
11 "Many people originating from Detroit have  
12 relocated to Marion, Ohio. There are several  
13 organized crime -- criminal groups from Detroit.  
14 Often when drug dealers travel from Detroit to sell  
15 drugs, members of the group or family will set up  
16 residence in the destination location."

17 And then let's skip down. We want to  
18 look at the section titled "Detroit-Why?"

19 "Detroit's main drug problem is  
20 heroin and cocaine. The drug users do not commonly  
21 use prescription drugs in Detroit as part of their  
22 drug habit."

23 Did you know that to be the case in  
24 this time frame while you were working for the DEA  
25 in Detroit, that drug users there were mostly --

1 preferred heroin and cocaine to prescription drugs?

2 MS. KNIGHT: Object to the form.

3 A. In my capacity in diversion, I didn't  
4 do enforcement activities on heroin and cocaine. I  
5 would acknowledge that heroin and cocaine has  
6 generally always been a problem in the Detroit,  
7 metro Detroit area. I don't know that I would call  
8 it the preferred.

9 During this -- during the time period  
10 prior to 2012, OxyContin 80 milligram tablets were  
11 a large problem in Detroit, not on the date -- this  
12 was issued in 2012. So I don't know that I totally  
13 agree with some of the information in here. I mean  
14 I don't have anything to dispute it.

15 And the other thing I would like to  
16 comment on is you kind of passed over quick into  
17 Marion, Ohio. That paragraph --

18 Q. (BY MR. LIVINGSTON:) You know, I --  
19 you know, that is not -- I haven't asked a question  
20 about Marion, Ohio. Again, if you want to -- you  
21 will have plenty of time with your own counsel, and  
22 you can run his clock. I don't want you running my  
23 clock.

24 A. I understand. But when you make a  
25 statement to me, I just want to acknowledge. Some

1 of them I don't accept, and you can just tell me.  
2 But if I don't get to comment on them and you just  
3 tell me and move on, I understand.

4 Q. Well, when I ask you about Topic A  
5 and you want to comment about Topic B, that is when  
6 it becomes a problem.

7 MS. KNIGHT: Counsel, you asked him,  
8 you read to him Marian -- portions of the Marion  
9 part. You just skipped over parts that were  
10 inconsistent with your argument. So --

11 MR. LIVINGSTON: All right. Thank  
12 you for the speaking objection.

13 Q. (BY MR. LIVINGSTON:) So the next  
14 question is, when you were with the DEA in Detroit,  
15 didn't you guys have team meetings, even though you  
16 were focused on pill diversion, where you would  
17 hear what was going on with respect to criminal  
18 gangs in Detroit? You guys didn't, you know, talk  
19 to each other?

20 MS. KNIGHT: Objection to form.

21 A. Only if there was some kind of  
22 relationship or it was in conjunction with the  
23 distribution of prescription drugs. I did not  
24 interact with agents on illicit drug  
25 investigations.

1           Q.           (BY MR. LIVINGSTON:) If you go to  
2 the next bullet point under the Detroit section, it  
3 says, "The prescription pills come from Detroit,  
4 however are not typically sold in Detroit.  
5 Prescription pills go for approximately double the  
6 amount in Ohio, Kentucky and West Virginia. The  
7 pill traffickers from Detroit commonly pay elderly  
8 people to fill prescriptions at pain clinics and  
9 also doctor shop."

10                       So do you see that this report is  
11 indicating that the problem is that these drug  
12 gangs are paying people to illegally obtain these  
13 drugs from pharmacies in Detroit but rather than  
14 sell them in Detroit, they are then being sold --  
15 sold, I'm sorry, in Ohio and neighboring states,  
16 correct?

17                       MS. KNIGHT: Objection to form.

18           A.           That is what this document says. But  
19 I think if they are linking it to the above  
20 paragraph, I think it is maybe specific to some  
21 gang activity in some of the certain areas. I  
22 don't know that -- it is a broad stroke to say that  
23 this was just a common practice.

24                       I am well aware that many of the  
25 pills were still being sold and marketed on the

1 streets of Detroit and the suburbs, in the general  
2 areas around Detroit. So it is kind of a broad  
3 stroke to say that predominantly are leaving  
4 Detroit and being sold elsewhere.

5 I do acknowledge that that occurred  
6 because there was a larger market or a better price  
7 per milligram in some of the areas outside of  
8 Detroit. I acknowledge that. But I don't know  
9 that it was as predominant as stated in this  
10 paragraph, through my experience in doing the cases  
11 when I was doing them.

12 Q. (BY MR. LIVINGSTON:) Of course, Lake  
13 and Trumbull Counties are in Ohio, correct?

14 A. That's correct.

15 Q. And the reference here to "The pill  
16 traffickers from Detroit commonly pay elderly  
17 people to fill prescriptions at pain clinics and  
18 also doctor shop," that is diversion, correct?

19 A. That is correct. It would be a  
20 little more than to fill prescriptions. They would  
21 actually -- they would actually enlist people.  
22 During this time period, there was a little  
23 different type of illicit conduct where they would  
24 recruit people and they would have them pose as  
25 patients, not even be -- going to an office. And

1 they would write prescriptions in mass and fill  
2 them and obtain them.

3 Q. Right.

4 A. Not exactly -- and it wasn't just  
5 elderly people. Generally, they focused on people  
6 that were on Medicaid.

7 Q. But in any event, the point here is  
8 that these -- if you are paying an elderly person  
9 to fill a script for no legitimate medical reason,  
10 then that is a form of diversion, correct?

11 A. Yes. And indirectly, that would be  
12 something that is tied to my investigation. But it  
13 would be you would -- you would see certain drugs  
14 increasing in dispensing at some of the pharmacies  
15 where this activity was occurring. In Detroit, I  
16 acknowledge, not in Lake and Trumbull County. But  
17 this is the kind of conduct that would fit into the  
18 type of review that I do.

19 Q. And part -- a major part of your job  
20 was to prevent this sort of thing from happening,  
21 where elderly people would be obtaining  
22 prescriptions from pharmacies -- I mean from  
23 doctors and getting them filled from pharmacies in  
24 Detroit illegally, correct? That was part of your  
25 job, was to prevent that from happening?



1           A.       On the first five years of my job or  
2       six years of my job, that was the main focus of my  
3       employment.

4           Q.       All right. Go to the next page,  
5       Bates 7552, again under "Awareness: Prescription  
6       Drug Interdiction." It says, "The Ohio State  
7       Highway Patrol Criminal Intelligent Unit analyzed  
8       large pill seizures since January 2011 to the  
9       present time. One hundred and one cases were  
10      analyzed, and it became evident that the majority  
11      of the large interdictions were resulting from the  
12      origin of Detroit, Michigan."

13                   And then there's a pie chart that  
14      shows where the drugs were headed. And do you see  
15      that Ohio is one of the major areas of where the  
16      drugs were taken?

17           A.       I see that.

18           Q.       And then if you go to the last page,  
19      7553, there's a Ohio map where they have indicated  
20      where the drug seizures have taken place. And  
21      obviously, there's a number of large drug seizures  
22      that took place in northeast Ohio, correct?

23                   MS. KNIGHT: Objection to form.

24           A.       There are. I can't -- it probably  
25      was a color at one time, so I can't tell what type

1 of drugs. But there are -- I don't know --  
2 compared to the other areas, I don't know if I  
3 would call it large, but there's a significant  
4 number there.

5 Q. (BY MR. LIVINGSTON:) Right. And  
6 Lake and Trumbull Counties are both in northeast  
7 Ohio, correct?

8 A. Yes. Some of them -- some of them  
9 may be in the bottom you circled. I don't know  
10 that you have the county on there. I believe some  
11 of those might be a little outside of the county.  
12 I think that is where the county line is, but there  
13 are some in both those counties, yes, sir.

14 Q. Please turn to Exhibit 55.  
15 (GE Exhibit 55 was marked for  
16 identification.)

17 Q. (BY MR. LIVINGSTON:) Do you know who  
18 Damian Blakeley is?

19 MS. KNIGHT: Do you have 55?

20 A. Hold on.

21 MS. KNIGHT: Our notebook goes  
22 through 54.

23 Q. (BY MR. LIVINGSTON:) You know, I  
24 think we emailed -- this is just a couple of pages  
25 of deposition testimony.

1 MS. KNIGHT: Hold on, one second,  
2 Mr. Livingston. We also got a little FedEx pack.

3 MR. LIVINGSTON: That may be in  
4 there. I'm not positive.

5 MS. KNIGHT: No, it is not. It says  
6 it is to replace Tab 2 in the binder, which would  
7 have been the --

8 A. Report.

9 MS. KNIGHT: -- exhibits to his  
10 report, so we don't have a 55.

11 Q. (BY MR. LIVINGSTON:) Well, like I  
12 said, this is just deposition testimony. I don't  
13 even care if it is marked as an exhibit, to be  
14 honest with you.

15 Have you reviewed Mr. Blakeley's  
16 deposition?

17 A. I do not recall that name, sir.

18 Q. Did you know that he was a long-time  
19 member of the Lake County Narcotics Bureau and that  
20 he was on a task force with the DEA for a number of  
21 years?

22 A. I do not recall Mr. Blakeley's name,  
23 no, sir.

24 Q. Let's just go to Page 95 to 99. Do  
25 you see in the middle of the page, he says, "So for

1 the oxycodone pills, starting with the  
2 30-milligram, where did they originate?"

3 "Like where are they made?"

4 No. In terms of -- yeah, that was a  
5 bad question. I apologize... Where did the people  
6 who were selling the Oxy 30-milligrams obtain their  
7 pills?"

8 Answer: "Mostly Detroit, Michigan."

9 Do you see that?

10 A. Yeah, could you just go back up. Can  
11 I just read a couple of pages of this, please.

12 Q. You can take your time to read the  
13 whole thing. I don't have a problem with that.

14 MS. KNIGHT: Well, we don't have a  
15 copy, Mr. Livingston, so if you want him to comment  
16 on --

17 MR. LIVINGSTON: No, I don't want --  
18 listen, this is cross examination. This is what I  
19 want him to read. You guys have available the  
20 whole transcript if you want to show it to him at a  
21 break or whatever you want to do.

22 A. Can you scroll it down a little,  
23 please.

24 Okay. I acknowledge that is what the  
25 transcript says.

1           Q.       (BY MR. LIVINGSTON:) So it looks  
2 like this pipeline of pills, OxyContin, illegally  
3 obtained OxyContin pills, you know, from Detroit,  
4 you know, also ended up depositing pills in Lake  
5 and Trumbull County, correct?

6           MS. KNIGHT: Objection to form.

7           A.       I'm not sure it says Lake and  
8 Trumbull. That is why I wanted to look up earlier  
9 the -- I think there's a city I am not familiar  
10 with.

11          Q.       (BY MR. LIVINGSTON:) All right.  
12 Let's see, maybe we will get lucky and possibly you  
13 read Mr. Dombek -- do you know who Mr. Dombek is?  
14 He is another narcotics person?

15          MS. KNIGHT: Objection to the form.

16          Q.       (BY MR. LIVINGSTON:) Did you review  
17 his deposition?

18          A.       No, sir.

19          Q.       Let's go quickly to Exhibit 26.  
20 (GE Exhibit 26 was marked for  
21 identification.)

22          Q.       (BY MR. LIVINGSTON:) Page 101 --  
23 let's go to 59 first.

24          MS. KNIGHT: Give us a moment.  
25 Exhibit 26.

1 Q. (BY MR. LIVINGSTON:) Exhibit 26,  
2 Line 16, beginning Line 16.

3 MS. KNIGHT: Just a moment,  
4 Mr. Livingston.

5 A. What page? I'm sorry.

6 Q. (BY MR. LIVINGSTON:) 59, starting on  
7 Line 16.

8 A. I am there.

9 Q. Do you see that Mr. Dombek  
10 corroborated what we just read from Mr. Blakeley's  
11 deposition, and he says, "We have had a lot of  
12 activity of pharmaceutical-looking drugs, whether  
13 or not they ended up being that, coming from  
14 states, Michigan, Detroit...." Do you see that?

15 A. I do.

16 Q. Why don't you go to Page 101.

17 A. It also --

18 MS. KNIGHT: Objection to form.

19 A. It also says Arizona, and it is  
20 interesting because it says "pharmaceutical-looking  
21 drugs." I know this was the time period where they  
22 were manufacturing pills to look like  
23 pharmaceuticals.

24 So there's a little more to that  
25 statement, but I agree that it does say coming from

1 Detroit, states Michigan and Detroit in particular.

2 Q. (BY MR. LIVINGSTON:) Why don't we go  
3 to Page 101 at the bottom, Line 21. And Mr. Dombek  
4 was being asked about the same Ohio State Highway  
5 Patrol report that the two of us just went over.  
6 And he is asked, "And the bulletin concerns issues  
7 with prescription drugs coming from the Detroit,  
8 Michigan area into Ohio. Do you agree with me?"

9 "Yeah. I am just looking for where  
10 it says specifically that on the back side."

11 Go to the middle of Page 102,  
12 starting on 11: "And you mentioned earlier in your  
13 deposition testimony that this is an issue that you  
14 and your colleagues have seen over the course of  
15 time; is that right?"

16 Answer: "Yes."

17 Question: "Prescription drugs coming  
18 from Detroit into Ohio?"

19 Answer: "Yes."

20 "And it looks like the information  
21 that was provided to you and your colleagues  
22 describes them coming in through Greyhound Bus  
23 Lines or rental cars, right?"

24 "That's correct."

25 So Mr. Dombek, who is, you know,

1 boots on the ground in Lake County with respect to  
2 drug enforcement, is testifying under oath that the  
3 biggest problem they were facing with respect to  
4 drugs in his county was the pipeline of drugs that  
5 were being illegally obtained across the street  
6 from your DEA office in Detroit and being deposited  
7 in Lake and Trumbull County, and you didn't even  
8 know about this --

9 MS. KNIGHT: Objection to the form.

10 Q. (BY MR. LIVINGSTON:) -- when you  
11 prepared your report?

12 MS. KNIGHT: Objection to the form.  
13 A misrepresentation of the document.

14 Q. (BY MR. LIVINGSTON:) You didn't know  
15 about this, right? It is not mentioned anywhere in  
16 your report; it is not mentioned in your schedule,  
17 correct? This is news to you. As you read it here  
18 now, this is news to you?

19 MS. KNIGHT: Counsel, this is  
20 argumentative.

21 MR. LIVINGSTON: No, it is not. It  
22 is cross examination.

23 MS. KNIGHT: You are allowed to  
24 cross. You are not allowed to argue with the  
25 witness.



1           A.       This information wouldn't have been  
2       essential to rendering my opinion in regards to the  
3       distribution of opioids from a distributor down to  
4       a pharmacy.

5           Q.       (BY MR. LIVINGSTON:) Are you  
6       familiar with the pharmacist's corresponding duty?  
7       Do you know what that is?

8           A.       Corresponding responsibilities? Yes,  
9       sir.

10          Q.       What is it?

11          A.       It is 1306.04 in the regulations, and  
12       a pharmacist has the responsibility to determine  
13       that the prescription is legitimate and that  
14       there's a doctor/patient relationship. Also  
15       requires if there's any anomalies or red flags that  
16       they dispel those before issuing the prescription.

17          Q.       You said red flags?

18          A.       Well, they don't say that in the  
19       regulation, but they say anything abnormal or  
20       anything that was identified out of the unusual,  
21       that those are resolved prior to the dispensing of  
22       the medication.

23          Q.       Has the DEA offered any guidance  
24       about what a red flag is?

25          A.       I think there are plenty of cases

1 that have occurred where they are published on the  
2 Federal Register or on the DEA website in regards  
3 to pharmacies and their corresponding  
4 responsibility. So I think there's plenty of  
5 information available.

6 Have they specifically sent a list  
7 out of red flags? I'm not aware of that.

8 Q. You didn't do any analysis to  
9 determine to what extent the defendant pharmacists  
10 in Lake and Trumbull County properly discharged  
11 their duty to exercise their corresponding  
12 responsibility?

13 A. I did not.

14 Q. And you did not endeavor to try to  
15 determine whether any suspicious order at the  
16 distribution level with respect to any of the  
17 defendant pharmacies ultimately was used to fill an  
18 illegitimate or not legitimate prescription,  
19 correct?

20 A. That was not part of my analysis, no,  
21 sir.

22 Q. Turn to Exhibit 2, your report,  
23 Schedule I.

24 MS. KNIGHT: So Mr. Livingston, I  
25 believe that is the -- I don't know what was wrong

1 with the version that was in the notebook, but that  
2 is what was in this other envelope, saying it  
3 should replace what is in --

4 MR. LIVINGSTON: I think we forgot to  
5 send the schedule. I'm not sure.

6 MS. KNIGHT: Don't worry about it.

7 Q. (BY MR. LIVINGSTON:) Mr. Rafalski,  
8 do you know who Lewis Colosimo is?

9 A. I do.

10 Q. Who is he?

11 A. Prior to my leaving the DEA or during  
12 my employment, I'm aware he is a diversion  
13 investigator, I believe, in the Pittsburgh,  
14 Pennsylvania office.

15 Q. Did you have any dealings with  
16 Mr. Colosimo when you were with the DEA?

17 A. I did.

18 Q. What were those dealings?

19 A. I know specifically during the  
20 Harvard drug investigation he assisted me and maybe  
21 took some actions subsequent to my case involving  
22 distribution from Harvard into his area. I believe  
23 I had conversations with him about an unrelated  
24 case, either before or after Harvard. I don't  
25 remember the specific time on that.

1 Q. Okay. Did you find him to be, you  
2 know, a competent DEA diversion inspector?

3 MS. KNIGHT: Objection to form.

4 A. I am always cautious to draw  
5 opinions, but matters that I dealt with him that he  
6 assisted me or I assisted him, I -- I was confident  
7 in those activities that we shared that he was  
8 competent. To assess his job performance, I don't  
9 think I am qualified to do that.

10 Q. (BY MR. LIVINGSTON:) Well, did you  
11 think he knew what he was doing, based on your  
12 interactions with him?

13 MS. KNIGHT: Objection to form.

14 A. Specifically to the matters that we  
15 were dealing with each other on, yes.

16 Q. (BY MR. LIVINGSTON:) And the matters  
17 you were dealing with him on was an investigation  
18 of a major drug distributor, correct?

19 A. No, there was some conduct in his  
20 area that got passed on that he took action on. So  
21 he didn't assist me with the Harvard case. It was  
22 just some actions subsequent or discovered through  
23 the Harvard case that he followed up and took  
24 action on.

25 Q. Well, when you -- when I asked you

1     what your dealings were, you said that in  
2     connection with the Harvard drug case, you worked  
3     with him, correct; is that not true?

4                     MS. KNIGHT:   Asked and answered.

5             A.       That is a broad statement,  
6     Mr. Livingston.  He -- he didn't assist me at all  
7     with the actual investigation of Harvard.  
8     Sometimes in doing an investigation, you will see  
9     activities that extend out beyond my geographic  
10    area.  And some of it was -- some of the drugs were  
11    sent into his geographic area, and he followed up  
12    on those distributions.

13                    So, in essence, it was linked to the  
14    Harvard, but he didn't actually investigate the  
15    Harvard case with me.

16            Q.       I understand that.  But he understood  
17    what Harvard did wrong, correct, why Harvard got in  
18    trouble with the DEA, correct?

19                    MS. KNIGHT:   Object to form.

20            A.       I am sure we had a discussion about  
21    that.

22            Q.       (BY MR. LIVINGSTON:)  And you knew  
23    that he was a long-time DEA diversion inspector,  
24    correct?

25                    MS. KNIGHT:   Objection to form.

1           A.       I don't recall knowing how long he  
2 was on the job. I mean he was -- I believe he was  
3 senior to me, but I didn't know how many years  
4 specifically. I don't remember having that  
5 conversation.

6           Q.       (BY MR. LIVINGSTON:) And in your  
7 report on Page 45, you indicate that you reviewed  
8 his deposition?

9           MS. KNIGHT: On Page 45 of the  
10 report?

11          MR. LIVINGSTON: Of the schedule, I'm  
12 sorry. I apologize.

13          MS. KNIGHT: No, that is okay. Just  
14 clarifying.

15          A.       I reviewed some of his deposition. I  
16 don't think I read his deposition from front to  
17 back.

18          Q.       (BY MR. LIVINGSTON:) Well, how did  
19 you determine what portions of his deposition you  
20 should read? Did you like do a word search, or how  
21 did you figure that out?

22          A.       Sometimes it would be a word search  
23 or sometimes I would more skim read it until I got  
24 to areas that I found more relevant or interesting.  
25 And then I would -- so it wasn't the same type of

1 review I would do with other depositions where I  
2 would sit and take notes and, you know, formulate  
3 like a draft document. So I did -- I did recall  
4 reviewing some of it, but not to the extent I would  
5 some of the others.

6 Q. And you know that he was one of the  
7 DEA agents who most often inspected Giant Eagle's  
8 distribution centers, correct?

9 A. I don't recall. I know he did that.  
10 I don't know that he did it most often. It is a  
11 small office, so it is possible. But I don't have  
12 that direct recollection.

13 Q. Well, you at least knew that he was  
14 one of the DEA diversion inspectors from the  
15 Pittsburgh office who inspected not only Giant  
16 Eagle's original warehouse, the HBC facility but  
17 later the GERX facility, correct?

18 A. I am aware he was doing some of the  
19 reviews, yes, sir.

20 Q. And then you also identify the  
21 exhibits to his deposition. Did you read all of  
22 those exhibits or just some of those exhibits?

23 A. I believe just some of them, sir.

24 Q. Which ones did you read?

25 A. I do not have my list here. Janet

1 Hart, Marion Wood --

2 Q. I'm sorry. I am asking with respect  
3 to Mr. Colosimo's deposition exhibits, which ones  
4 of those did you read?

5 A. I don't recall, sir.

6 Q. Do you recall a number of inspection,  
7 DEA inspection reports for Giant Eagle's facilities  
8 were exhibits to his deposition?

9 A. I believe, yes, sir, I recall that.

10 Q. Did you review all of them?

11 A. I don't recall if I did or not.

12 Q. When you did a word search on  
13 Mr. Colosimo's deposition, did you ever search for  
14 the words "full compliance"?

15 A. I don't recall, Mr. Livingston.

16 Q. Did you ever search for the words "no  
17 discrepancies"?

18 A. I don't recall, Mr. Livingston.

19 Q. Did you ever search for the words "a  
20 case closed"?

21 A. Just for correction on the earlier  
22 statement, they weren't in a Word, so the PDF  
23 searches are not quite as reliable as the Word  
24 searches. I did do some searches that method. I  
25 don't recall specifically on the last question



1 searching for that exact term either.

2 Q. Well, do you get these in  
3 Min-U-Script form with a word index at the back of  
4 the deposition?

5 A. I believe some I do. I don't  
6 remember specifically if I did with his.

7 Q. So if you wanted to, when you get  
8 those word indexes, you can literally just look up  
9 the word "full" and see where it comes up, correct?

10 A. If it is included with this exhibit.  
11 I'm not sure all of them do.

12 Q. And then further on down on this  
13 list, you indicate you reviewed the deposition, the  
14 March 5th deposition of Rick Shaheen. Do you know  
15 who Rick Shaheen is?

16 A. No, I don't recall.

17 Q. Well, do you know that Rick Shaheen  
18 was mentioned by Mr. Colosimo because they worked  
19 together when Mr. Shaheen was with the Pennsylvania  
20 Attorney General Office Drug -- Antidrug Unit?

21 A. I don't recall Mr. Shaheen's name,  
22 sir.

23 Q. Okay. And you know that Mr. Shaheen  
24 is in charge of pharmacy security for Giant Eagle  
25 and has been since 2013? Does that ring a bell for

1     you?

2             A.       It does not.

3             Q.       It does not ring a bell? Well, let's  
4     just ask it in a hypothetical fashion. Assuming  
5     that Rick Shaheen, with a long-term law enforcement  
6     background with respect to drugs, has been hired by  
7     Giant Eagle to focus solely on making sure that no  
8     diversion occurs at its pharmacies, you would agree  
9     that that is a good control for a corporately-owned  
10    pharmacy chain to have, correct?

11            MS. KNIGHT: Objection to form.

12            A.       Generally speaking, any kind of  
13    proactive action like that would be a good thing.  
14    I'm not specifically -- I am not specifically  
15    commenting on the capabilities of Mr. Shaheen. But  
16    the particular act you described would always be a  
17    good thing to help to try to prevent diversion and  
18    maintain effective controls to prevent it.

19            Q.       (BY MR. LIVINGSTON:) All right.  
20    Now, I think a minute ago you just said that you  
21    don't remember which, if any, of the inspection  
22    reports you may have reviewed. But one thing is  
23    for sure, nowhere in your 158-page report do you  
24    mention the outcome of any of Giant Eagle's  
25    inspections by the DEA, correct?

1           A.       That's correct.

2                   MS. KNIGHT:   Objection to form.

3           Q.       (BY MR. LIVINGSTON:)   And unlike  
4   Mr. Colosimo and the other folks at the DEA  
5   Pittsburgh office who inspected Giant Eagle's  
6   facilities, you never actually physically inspected  
7   either HBC or GERX; is that correct?

8           A.       I never was physically present at  
9   either of those locations, sir.

10          Q.       Did you ever ask plaintiffs' counsel  
11   for that opportunity?

12          A.       To go there and inspect them?

13          Q.       Yes.

14          A.       I did not.

15          Q.       Did they ever tell you that that was  
16   an option, that under the Federal Rules, a party  
17   can request and obtain the right to physically  
18   inspect the other parties' facilities?

19          A.       They did not tell me that.   I am not  
20   aware of that, sir.

21          Q.       Now that you are aware of it, is that  
22   something that you wish you had had the opportunity  
23   to do before you rendered your opinions in this  
24   matter?

25          A.       Well, I think anything that I could

1 do to further gain information would be -- not  
2 critical but important. If I had a choice to do  
3 anything, I wish I could interview the people  
4 myself versus the deposition. That is what I would  
5 wish to do first. But anything would be important,  
6 sir.

7 If I could go onsite, I'm not sure I  
8 could -- it would be relevant as far back as my  
9 review is, but I wouldn't preclude doing anything  
10 that would gain further information.

11 Q. Now, to try to set the scene a little  
12 bit, were you aware that Giant Eagle, before it  
13 opened up its H -- or obtained its license,  
14 Schedule 3 license for HBC in 2009, that prior to  
15 that, it had a List 1 chemical distribution  
16 license?

17 A. I generally recall seeing something  
18 about that in the document review, yes.

19 Q. And that in order to obtain that  
20 license, there's similar requirements, not  
21 necessarily identical but somewhat similar to the  
22 requirements for -- a distribution license for  
23 Schedule 3 drugs, correct?

24 MS. KNIGHT: Objection to form.

25 A. I think a List 1 chemical distributor

1 is quite a bit different than a controlled  
2 substance distributor. It is the distribution, and  
3 there's some general things that are comparable.  
4 But generally speaking, they are much different  
5 registrations.

6 Q. (BY MR. LIVINGSTON:) Well, there's  
7 security requirements for a person who is licensed  
8 to distribute List 1 chemicals, correct?

9 A. Yeah, but they are very general and  
10 not as specific as for controlled substances.

11 Q. Yeah, I didn't say that, but just  
12 that they do have security requirements, correct?

13 A. Yeah, they just have a general  
14 statement about it. They are nowhere -- those are  
15 nowhere similar, the securities.

16 Q. And you know that HBC started  
17 distributing List 1 chemicals in 1997, correct?

18 A. I don't know the specific year, sir.

19 Q. Well, roughly in that time frame?

20 A. Yes. Almost all distributors that  
21 are controlled substance distributors do a  
22 coincidental activity with List 1 chemicals because  
23 of the over-the-counter prescriptions or  
24 over-the-counter medications that contain  
25 pseudoephedrine and ephedrine. So that is pretty

1 typical a business activity for a distributor.

2 Q. All right. Why don't we go to  
3 Exhibit 33, Giant Eagle 33.

4 MS. KNIGHT: Counsel, we have been  
5 going a little over an hour. Are we at a good like  
6 five-minute stopping break?

7 MR. LIVINGSTON: Yeah, that is fine.

8 MS. KNIGHT: Really, just five  
9 minutes should be fine.

10 THE VIDEOGRAPHER: Okay. We will go  
11 off the record at 9:13.

12 (Whereupon, a break was had from 9:13  
13 a.m. until 9:24 a.m. EDT)

14 THE VIDEOGRAPHER: We are back on the  
15 record at 9:24.

16 Q. (BY MR. LIVINGSTON:) Mr. Rafalski,  
17 can you tell me how many preregistration  
18 inspections Giant Eagle's HBC and GERX facilities  
19 had?

20 A. I cannot, sir.

21 Q. Do you know how many cyclic  
22 inspections Giant Eagle's HBC and GERX facilities  
23 had during the time frame that we have been talking  
24 about for this case?

25 A. No, sir. I do not.

1           Q.       All right. Well, let me represent to  
2       you that they had three preregistration inspections  
3       and eight cyclic inspections between 1997 and 2020.

4                    You would agree that that is a  
5       significant number of inspections, right?

6                    MS. KNIGHT: Objection to the form.

7           A.       Is that specific to the GERX DC or at  
8       both facilities? I'm sorry.

9           Q.       (BY MR. LIVINGSTON:) I said both  
10      facilities.

11          A.       Both.

12          Q.       Collectively.

13          A.       That would be probably an expected  
14      amount.

15          Q.       And I think you testified yesterday  
16      that typically distributors end up fifty percent of  
17      the time when they have their facilities inspected  
18      getting at least a letter of admonishment from the  
19      DEA, correct?

20          A.       That is the matter I wanted to  
21      discuss with you this morning before starting my  
22      testimony.

23          Q.       Well, yes or no, you said that under  
24      oath yesterday?

25          A.       I did say that. In rethinking that

1 over the night, I'm not comfortable with that  
2 answer, mainly because I didn't keep a scorecard.  
3 And early in my career, before there was electronic  
4 ordering, there was generally record violations.  
5 But as time went on, I'm not confident with fifty  
6 percent, as that is kind of a guess, and I don't  
7 like to guess.

8 So I am not going to stand by the  
9 fifty percent. That is what I wanted to correct  
10 this morning.

11 Q. Well, are you telling me that you are  
12 uniquely qualified to give opinions about whether  
13 distributors are complying with their DEA  
14 regulatory obligations, you were with the DEA for  
15 twelve, thirteen years, and you can't even ballpark  
16 it for us how often you end up, when you were doing  
17 your inspections, how often you ended up, you know,  
18 at least sending out a letter of admonishment to  
19 the distributor?

20 MS. KNIGHT: Object to form.

21 A. I think that is an important  
22 question, and I don't want to guess on that,  
23 Mr. Livingston. I don't want to ballpark it.

24 Q. (BY MR. LIVINGSTON:) And not only  
25 did you tell us yesterday under oath that your best



1 estimate was fifty percent, but in another opioids  
2 case you also testified under oath that it was  
3 fifty percent.

4 MS. KNIGHT: Objection to form.

5 A. I don't recall that. But I am not  
6 comfortable, without having the ability to go back  
7 and look and give an accurate number, with just  
8 using fifty percent.

9 Q. (BY MR. LIVINGSTON:) Let's go to  
10 Exhibit 47.

11 (GE Exhibit 47 was marked for  
12 identification.)

13 Q. (BY MR. LIVINGSTON:) Do you see  
14 that -- Exhibit 47 is portions of your videotaped  
15 deposition transcript from the New York opioids  
16 case.

17 A. I see that.

18 Q. And it was taken in February of 2020,  
19 correct?

20 A. Yes, sir.

21 Q. Would you go to Page 849, 850.

22 At the bottom of Page 849, starting  
23 on Line 20, you were asked, "What about for  
24 distributors? How common was it that you would  
25 issue -- the DEA would issue letters of admonition

1 following inspections or audits?"

2 Answer: "I think it would be at  
3 least fifty percent," correct?

4 A. Yes. But that question, I think, is  
5 just about inspections, not specific to  
6 distributors.

7 Q. It says "what about for  
8 distributors"?

9 A. Later on it does say fifty cent --  
10 fifty percent. I acknowledge that.

11 Q. And that was your testimony given  
12 under oath in the New York case, correct?

13 A. That is what I stated, yes.

14 Q. And you also stated it under oath  
15 yesterday?

16 A. I did. I said it was -- I believe I  
17 said it was a best guess, and I am not comfortable  
18 guessing about that.

19 Q. And so you just woke up in the middle  
20 of the night thinking, oh, my gosh, I better change  
21 this testimony, or did you have a conversation with  
22 any person about this particular issue?

23 A. I had no conversations. I did not  
24 wake up in the middle of the night. When I got  
25 back after my testimony, I was having dinner by

1 myself and thinking about that number and being a  
2 guess, and I wasn't comfortable with it.

3 Q. All right. Did you ever have trouble  
4 after you gave the New York testimony? Did you  
5 ever recant that testimony?

6 A. I did not.

7 MS. KNIGHT: Objection to the form.

8 A. I did not.

9 Q. (BY MR. LIVINGSTON:) Well,  
10 regardless of what the exact percentage is or is  
11 not for how often the DEA would issue letters of  
12 admonition after an inspection to a distributor,  
13 you would agree that Giant Eagle's record of all  
14 clean inspections for three preregistration  
15 inspections and eight cyclic inspections is  
16 exemplary, correct?

17 MS. KNIGHT: Objection to form.

18 A. I would say that is expected.

19 Q. (BY MR. LIVINGSTON:) Well, you said  
20 it was expected, but you also have said that it  
21 was -- forget the percentage, that it certainly  
22 wasn't uncommon for even a single -- for  
23 distributors to get letters of admonition for not  
24 being in compliance after an inspection?

25 A. I did say that. And doing

1 inspections, as I have stated just earlier, there's  
2 all kinds of violations. Typically early in my  
3 career, record violations were pretty common,  
4 especially related to distribution because they  
5 were paper forms. Later on they became a little  
6 more compliant. There's always the potential.

7 But in your statement earlier, I'm  
8 not aware of what the DEA in a totality, how many  
9 LOAs are issued. Only my experience with my cases  
10 and people that I am with in Detroit.

11 But every time I go in, I hope and  
12 expect that there's no violations. It is not  
13 something that is -- I seek to find. That is -- a  
14 good, compliant investigation is good because they  
15 are compliant with the regulations.

16 Q. Well, can you identify, not give us  
17 the particular name, but just can you think of any  
18 distributor who you inspected that often who -- for  
19 whom you found no violations at all?

20 A. I have never had an inspection as  
21 often as what is happening. If Mr. Colosimo was on  
22 each one of those, I have never had that situation  
23 in Detroit, so wider geographic area and more  
24 investigators.

25 There have been some that I have had

1 recollection that had no violations. I don't know  
2 that they had them every time. And there was no  
3 registrants that were exclusive to me that I would  
4 do every one. They are generally distributed --  
5 they are generally avoided where you don't always  
6 go to the same place. That sometimes happens in  
7 offices where there's smaller numbers of  
8 investigators.

9 Q. When -- yeah. I didn't suggest that  
10 Mr. Colosimo was the agent or investigator,  
11 inspector who inspected each time. He just  
12 testified about each of those inspections.

13 But let me ask you this: How many  
14 times did you investigate or inspect a distributor  
15 more than once?

16 A. There's a couple I can recall doing  
17 more than once.

18 Q. Which one was the more -- more than  
19 twice?

20 A. I'm not going to guess on that. And  
21 one of the reasons is sometimes I go as the lead,  
22 so it is my assignment. Sometimes I go as a backup  
23 or assisting somebody. So I may have visited and  
24 been present but not the lead. And I am not going  
25 to guess on that because I just don't know. I

1 never kept records to be able to accurately answer  
2 that, and I don't want to guess.

3 Q. And did you ever find that a  
4 distributor's SOMS system that you inspected was in  
5 compliance?

6 A. I believe there were some, yes.

7 Q. Okay. And what kind of threshold  
8 system did they have?

9 A. Without disclosing the registrant,  
10 one that I recall, because I had concerns going in,  
11 was a manual system. And I actually found that to  
12 be compliant, but it was based on a business  
13 activity and the abilities and knowledge of the  
14 employees.

15 I can recall a couple of smaller  
16 companies that had compliance systems. I can also  
17 recall some that did not. But off the top of my  
18 head, I didn't really keep records or I don't have  
19 a recollection specifically of the different  
20 companies and what they had and didn't have.

21 Q. Without disclosing the name of the  
22 registrant, the one that was a manual system, can  
23 you tell us what was the nature of the business?  
24 You said based on business activity. What did you  
25 mean by that?

1           A.       They were unique. They distributed  
2       to dispensing doctors and specific kinds of -- like  
3       dentists operating at clinics, and there were some  
4       distributions I had concern with, but going onsite  
5       and having a discussion with the compliance people  
6       and the owner, I was -- I believed that they were  
7       compliant in the knowledge of their registrants and  
8       what they were dispensing in their business  
9       activities. But it was -- the scope of their  
10      business wasn't as large as a distributor like, for  
11      example, Giant Eagle.

12           Q.       My next question is, how many  
13      customers, different customers, just roughly,  
14      fifty, a hundred, a thousand, ten thousand?

15           A.       Not thousands. I don't specifically  
16      recall. I don't want to guess on that. I don't  
17      believe it was even over a hundred. I believe it  
18      was under a hundred, but I don't remember  
19      specifically how many. It wasn't a large  
20      distribution because it was a unique type of  
21      business.

22           Q.       Do you know how many pharmacies Giant  
23      Eagle has in Ohio?

24           A.       Just in the two counties overall, I  
25      have seen a document about that, but I don't recall

1 it off the top of my head.

2 Q. And how did the manual system work?  
3 Was there just people who were fairly familiar with  
4 the customers who would, you know, identify  
5 unusually large orders or suspicious orders of some  
6 sort?

7 A. There was a multitude of things they  
8 did. There was more of an intimate relationship  
9 with the sales. The CEO was in the field a lot and  
10 sales. And they used -- actually used people to  
11 evaluate some companies. They had questioned some  
12 outside consultants. The compliance people had  
13 pretty intimate knowledge of who their customers  
14 were and what they were ordering.

15 During my interview, I didn't find  
16 any areas where they weren't -- didn't have  
17 knowledge of the customers that I reviewed or the  
18 questions that I had.

19 Q. So one of the things that gave you  
20 comfort was their familiarity that the compliance  
21 people had with their customers?

22 A. Well, it was a multitude of things,  
23 but that was one. You know, they had an  
24 onboarding, they had customer files. They had a  
25 knowledge of what they were ordering. They were



1     aware if there were increases. It was a system  
2     that I didn't find any faults with on that  
3     particular inspection. I don't know moving forward  
4     if it changed, but --

5             Q.       All right. So you are aware that  
6     Giant Eagle never received a letter of admonition,  
7     correct?

8             A.       I believe that is an accurate  
9     statement, yes, sir.

10            Q.       There was never any kind of  
11     administrative action of any kind ever taken  
12     against Giant Eagle for violating any DEA  
13     regulations, correct?

14            A.       Not that I am aware of.

15            Q.       And Giant Eagle never was penalized  
16     or entered into any kind of memorandum of  
17     understanding for any violation of any DEA  
18     regulations, correct?

19            A.       That's correct.

20            Q.       And you at least know -- you would at  
21     least acknowledge that Giant Eagle was found to be  
22     in full compliance at the conclusion of every  
23     inspection that I mentioned to you earlier?

24                    MS. KNIGHT: Objection to form.

25            A.       I'm not sure that I reviewed every

1 inspection, the results, but I'm not going to  
2 dispute your comment. But I don't have personal  
3 knowledge of that.

4 Q. (BY MR. LIVINGSTON:) Are you saying  
5 that, in the preparation of your opinion regarding  
6 whether Giant Eagle's SOMS system was complying  
7 with DEA regulations, you didn't think it was  
8 material for you to consider, at least review and  
9 consider the outcome of the inspection report,  
10 inspections that were done by your DEA colleagues?

11 MS. KNIGHT: Objection to form.

12 A. I wouldn't say it wasn't important,  
13 but I didn't put a high value on it only because in  
14 my experience with the cases I have worked,  
15 generally there would be clean inspections during  
16 the time frame where I took action, in regarding,  
17 specifically, Masters and Mallinckrodt.

18 Q. Well, you identify in your report  
19 some instances where our co-defendants may have had  
20 some minor violations of DEA regulations, correct?  
21 You identify those in your report, correct?

22 MS. KNIGHT: Object to form.

23 A. Yes, sir.

24 Q. (BY MR. LIVINGSTON:) Okay. But in  
25 your report, you don't mention that Giant Eagle had

1 clean inspections; you don't mention that at all,  
2 right?

3 A. No. But I think when I don't mention  
4 they had any adverse actions, I think short of  
5 thinking I just didn't put that information in  
6 there, I think that is the inference you could  
7 take.

8 Q. Why don't we go to Exhibit 38.  
9 (GE Exhibit 38 was marked for  
10 identification.)

11 Q. (BY MR. LIVINGSTON:) This is a cheat  
12 sheet that we prepared to avoid the necessity of  
13 having to go through every single inspection  
14 report. And, you know, if we have to do that, we  
15 certainly have the time, and we will do it. But I  
16 thought we would maybe try to streamline things by  
17 looking at this slide that we prepared.

18 So this is just with respect to HBC.  
19 This doesn't include GERX.

20 We have already talked about  
21 Mr. Colosimo. You would acknowledge that he has  
22 thirty-one years' experience as a DEA diversion  
23 investigator, correct?

24 MS. KNIGHT: Objection to form.

25 A. I do not know how much time. I don't

1 dispute this or when thirty-one years was, but I  
2 don't have any independent knowledge of that.

3 Q. (BY MR. LIVINGSTON:) Well, if you  
4 reviewed his deposition, you would have that  
5 knowledge. I thought you said you at least  
6 reviewed portions of it.

7 MS. KNIGHT: Objection to form.

8 A. I did. I don't recall seeing that he  
9 had thirty-one years on the job.

10 Q. (BY MR. LIVINGSTON:) Okay. And that  
11 would be -- about two and a half times the amount  
12 of time you had when you were with the DEA; is that  
13 correct?

14 MS. KNIGHT: Objection to form.

15 A. I don't know if it was two and a  
16 half, but it was considerably more years than I  
17 had.

18 Q. And do you know who Kurt Dittmer is?

19 A. I don't know him personally. I know  
20 that he is a DEA -- a diversion investigator, but I  
21 don't recall much more about that other than his  
22 name.

23 Q. And you see he had over twenty years  
24 experience and he was a DEA group supervisor?

25 MS. KNIGHT: Objection to form.

1           A.       I see that on this chart.

2           Q.       (BY MR. LIVINGSTON:) And do you know  
3 who Vincent Tomei is?

4           A.       Not without seeing it on the chart,  
5 no, sir.

6           Q.       And Michael Kupchick, Pittsburgh --  
7 another DEA diversion investigator?

8           A.       I see that on the chart.

9           Q.       And do you know who -- never heard of  
10 John Conlon either, I take it?

11                   MS. KNIGHT: Object to form.

12           A.       The name not personally, no.

13           Q.       (BY MR. LIVINGSTON:) Well, did  
14 you -- how do you know -- what do you know about  
15 him? You just said you know the name. How do you  
16 know the name?

17           A.       Just through working at the DEA.  
18 Might have been present at one time when I met with  
19 Colosimo or some other matter. The name is  
20 familiar to me.

21           Q.       And Jeff Sousa, have you ever heard  
22 of him?

23           A.       Yes, him too, but probably with  
24 dealings through Mr. Colosimo maybe. The name  
25 seems familiar.

1           Q.       Do you see that we have just sort of  
2 highlighted sort of the ultimate conclusion of the  
3 reports and which inspections each one of these DEA  
4 inspectors was involved with?

5                    You see in 2009 when Mr. Colosimo did  
6 the preregistration inspection for HBC and he  
7 approved HBC's facility for a Schedule 3 license,  
8 correct?

9                    MS. KNIGHT:   Objection to form.

10           A.       It doesn't give all of those details.  
11 And that is what your cheat sheet says, but I would  
12 like to read the report where it says deemed  
13 adequate, the security system to see specifically  
14 what it says.   But I acknowledge that your chart  
15 says that.

16           Q.       All right.   Well, like I said, I kind  
17 of suspected we probably would have to go back.   We  
18 will do that.

19                    Just when you get to 2013, Mr. Conlon  
20 concludes "no discrepancies with respect to  
21 recordkeeping or security.   Both recordkeeping and  
22 security are in full compliance with..."

23                    And when you do -- when the DEA does  
24 these cyclic investigations, one of the major  
25 things that they look at is the SOMS system,

1 correct, that is part of the security and  
2 recordkeeping regulations?

3 A. Well, it is part of being -- doing  
4 the onsite inspection. I don't know that it is  
5 more important than any other section, but it is  
6 something that they should review and comment on.

7 Q. Right. And Mr. -- I want to ask you,  
8 remember we talked yesterday about how the  
9 regulation refers to requiring registrants to be in  
10 substantial compliance with the security  
11 regulations; we went over that?

12 A. Yes, sir.

13 Q. And here we have a finding that Giant  
14 Eagle was not substantially in compliance but  
15 rather in full compliance, correct?

16 A. If that is what the statement of Mr.  
17 Sousa says, then I agree that is what that  
18 statement says.

19 Q. Okay. And in 2014, Mr. Sousa reaches  
20 the same conclusion. He says "No discrepancies  
21 with respect to recordkeeping or security. Both  
22 recordkeeping and security are in full compliance."  
23 Do you see that?

24 MS. KNIGHT: Object to form.

25 A. I do see that statement. But to say

1 recordkeeping and security are in full compliance,  
2 it is a pretty broad statement without looking at  
3 the report.

4 Q. (BY MR. LIVINGSTON:) Yes.

5 A. Not that I need to read them all, but  
6 I wouldn't disagree that the report may say that.  
7 Maybe in summary at the beginning, I am guessing.

8 Q. And when you go -- and your opinion  
9 that is in your report is that from 2009, when HBC  
10 first was granted a license for Schedule 3 drugs,  
11 until hydrocodone was reclassified in 2014, during  
12 that entire period of time, Giant Eagle was not  
13 even in substantial compliance; it wasn't in  
14 compliance at all, right?

15 A. In regards to their SOMS system,  
16 that's correct.

17 Q. In other words, you disagree with the  
18 conclusions reached by all of these DEA agents,  
19 correct?

20 MS. KNIGHT: Object to the form.

21 A. Well, that is why I would like to  
22 review the documents to ensure that they even  
23 inquired about those things in their investigation.  
24 It is not a mandate that they be required. So I  
25 would like to see what description they had and



1     what awareness they had of the system. But I am in  
2     disagreement if it says full compliance with  
3     security, I do not disagree -- I do not agree with  
4     that statement.

5             Q.       (BY MR. LIVINGSTON:) So you publish  
6     your report in April, which contains all of your  
7     final opinions for this case, and now we are taking  
8     your deposition in June. And you haven't taken the  
9     time to review any of these inspection reports,  
10    correct?

11            MS. KNIGHT: Objection to the form.

12            A.       That's correct.

13            Q.       (BY MR. LIVINGSTON:) Well, I guess  
14    now is as good a time as any to finally look at  
15    these reports. Let's go to Exhibit 34.

16                    (GE Exhibit 34 was marked for  
17                    identification.)

18            Q.       (BY MR. LIVINGSTON:) Page, at the  
19    top, we will go to Page 9.

20            MS. KNIGHT: Just a moment. Sorry,  
21    Mr. Livingston. He is getting there.

22            A.       Go ahead.

23            Q.       (BY MR. LIVINGSTON:) Okay. You see  
24    this is a report by Mr. Colosimo regarding the  
25    approval of HBC's request for a Schedule 3 license

1 in October of '09?

2 MS. KNIGHT: So you said Page 9 in  
3 the exhibit; is that right?

4 A. I agree it is Mr. Colosimo.

5 MR. LIVINGSTON: Page 9 at the top.

6 A. Go ahead.

7 MR. LIVINGSTON: Matt, you have got  
8 different pages than I have.

9 MS. KNIGHT: Yeah, Page 9 doesn't  
10 have his name on it. That is why I was asking.

11 A. I went back and confirmed it on the  
12 first page.

13 MR. LIVINGSTON: Why don't we go  
14 about Bates number, how about Bates Number 33024,  
15 USDEA, 33024.

16 A. I think that must be a different tab  
17 than -- I'm sorry. You are saying Tab 34?

18 Q. (BY MR. LIVINGSTON:) 33. 33. Maybe  
19 that is the problem. Let's go to Tab 33.

20 (GE Exhibit 33 was marked for  
21 identification.)

22 A. All right. And the Bates number  
23 again, please.

24 Q. (BY MR. LIVINGSTON:) 33024 and Page  
25 9 at the top.

1           A.       Okay. I am there.

2           Q.       So do you see that this is a report  
3 by Mr. Kupchick?

4           A.       I do.

5           Q.       And this is a cyclic investigation.  
6 Also he was helped by Mr. Tomei.

7           A.       I see that.

8           Q.       And the date of this is May 13th,  
9 2011. And just for the jury's understanding, this  
10 form is a form that you used too when you were with  
11 the DEA or something very similar to it, correct?

12          A.       Yes.

13          Q.       And it was part of every DEA  
14 diversion inspector's job after they inspected a  
15 facility to prepare a report on the findings,  
16 correct?

17          A.       That is the training and the manual  
18 instruction, yes, sir.

19          Q.       And the synopsis at the beginning  
20 just kind of quickly gives you sort of a summary of  
21 the outcome?

22          A.       Yes, it does.

23          Q.       And it says "Cyclic Investigation and  
24 Case Closing." What does "case closing" mean?

25          A.       Well, that means the onsite

1 investigation has been concluded.

2 Q. Okay. And that means at that point  
3 from the DEA's perspective, the registrant is in  
4 compliance, correct?

5 A. No. It just means the matter is  
6 closed.

7 Q. Why would you close the matter if the  
8 registrant is still not in compliance? Wouldn't  
9 you -- I mean that doesn't sound like the DEA would  
10 be doing its job in that situation, right?

11 MS. KNIGHT: Objection to form.

12 A. Well, until -- if there's a pending  
13 action with the registrant, it should remain open.  
14 And that is the training. But I don't draw that  
15 assumption. With some -- you know, in my career, I  
16 know that some were closed prior to that conclusion  
17 and they were supplemented. But generally speaking  
18 when it says "case closed," the matter has had a  
19 final resolution.

20 Q. (BY MR. LIVINGSTON:) Okay. Why  
21 don't we skip down on to the third paragraph under  
22 "Synopsis." And it says, "This investigation  
23 revealed no discrepancies with respect to  
24 security." That is just another way of saying  
25 there was no finding of a violation of the DEA

1 regulations, correct?

2 MS. KNIGHT: Objection to form and  
3 misrepresentation on the document.

4 A. I just think it says what it says,  
5 sir.

6 Q. (BY MR. LIVINGSTON:) Well, you are  
7 an expert. You are a DEA expert. You are reading  
8 a DEA report. Nobody has a better DEA decoder ring  
9 than you. What does that mean to you?

10 MS. KNIGHT: Objection to form.

11 A. It means this investigation revealed  
12 no discrepancies with respect to security.

13 Q. (BY MR. LIVINGSTON:) And what does  
14 that mean, no discrepancies?

15 A. I guess no -- nothing that was  
16 correctable. I don't know if that is the language  
17 I would use. Nothing -- no problems.

18 Q. All right. Let's go to 33026. It  
19 talks about under "Details" the basis of the  
20 investigation. And it says that this is being done  
21 pursuant to an office cyclic work plan. You had  
22 similar cyclic work plans when you were a DEA  
23 inspector as well, correct?

24 A. Yes, I did.

25 Q. All right. Under the next paragraph,

1 the last sentence says, "This investigation was  
2 initiated on May 13, 2011, and concluded on May 17,  
3 2011, with a meeting with management." Now, how  
4 much time have you spent with respect to the  
5 opinion that you have rendered in this matter  
6 relating to Giant Eagle?

7 MS. KNIGHT: Objection to form.

8 A. I don't understand the question. Can  
9 you ask that again, please?

10 Q. (BY MR. LIVINGSTON:) Yeah. How much  
11 time did you spend on your opinion that Giant Eagle  
12 had a subpar SOM system? How much time?

13 A. I didn't -- I don't -- I don't recall  
14 the exact number of hours.

15 Q. Well, was it five hours, ten hours,  
16 twelve hours?

17 A. No. Much more than that.

18 Q. How many?

19 A. I'm not sure. I am not going to  
20 guess.

21 Q. Can't ballpark it?

22 A. No.

23 Q. Okay. Well, if you don't -- if you  
24 can't tell us, then I guess nobody can, right?

25 A. I can just tell you it was a

1 substantial amount of time. I didn't keep a  
2 specific amount of time. I know the total time I  
3 wrote -- went -- spent on the report. I didn't  
4 keep specific records for each of the companies.  
5 So, no, I am not going to guess or ballpark it.

6 Q. All right. And then it says that  
7 they had a meeting with management. You didn't  
8 meet with Giant Eagle's management, did you?

9 A. I did not.

10 Q. Okay. Let's go down to the last  
11 paragraph on this page. It says, "HBC was approved  
12 as a distributor of List 1 chemicals on August 27,  
13 1997, and was assigned DEA Registration Number.  
14 The subject firm was the subject of in-depth cyclic  
15 investigations in 2002, 2004 and 2008."

16 Now, you see that this report is  
17 looking retrospectively at prior inspections of the  
18 facility, correct?

19 MS. KNIGHT: Objection to form.

20 A. Yes. And that statement is specific  
21 to a List 1 chemical.

22 Q. (BY MR. LIVINGSTON:) Right. Right.  
23 Yeah, I wasn't suggesting otherwise. And that was  
24 a common practice for you and other DEA inspectors  
25 that in these reports, you would look -- you would

1 include what the outcome was of prior inspections,  
2 correct?

3 A. Generally speaking, yes. I am not  
4 sure that it would -- that it would cross over to  
5 do other business activities, but that is just the  
6 style of this writer.

7 Q. And then the next sentence says, "No  
8 violations were uncovered during these  
9 investigations. HBC was approved as a distributor  
10 of controlled substances in October of 2009." Do  
11 you see that?

12 A. I do.

13 Q. Okay. So again this is like probably  
14 the, you would agree, the first cyclic inspection  
15 of the HBC facility after it obtained, you know,  
16 its Schedule 3 license, correct?

17 MS. KNIGHT: Object to the form.

18 A. By looking at the date and you  
19 producing no other document, yes.

20 Q. (BY MR. LIVINGSTON:) All right.  
21 Would you go to Page 33028 or Number 13 at the top?

22 A. Okay.

23 Q. It says, "After a thorough review and  
24 analysis of the required records, it was determined  
25 that all of the controlled substances were



1     accounted for." So this was kind of like an  
2     inventory check, right? Correct?

3             A.       It is.

4             Q.       Okay. And you would agree that a DEA  
5     agent should, in fact, make sure that his  
6     inspection is thorough, correct?

7             A.       Well, this is stating this in regards  
8     to the required records.

9             Q.       And you didn't do any kind of  
10    inventory check like these DEA inspectors did, did  
11    you?

12            A.       In regards to what, sir?

13            Q.       To Giant Eagle.

14            A.       No, I did not.

15            Q.       All right. Would you go to Page  
16    33034, Page 19 at the top? You see at the top, it  
17    says, "All selections are performed using the  
18    Vocollect directed activity." Do you know what the  
19    Vocollect system is?

20            A.       Reading this, it looks like it is the  
21    picking system.

22            Q.       Well, before you read this, when you  
23    prepared your report, did you know that Giant Eagle  
24    during all the relevant period of time employed and  
25    used the Vocollect system?

1           A.       I don't recall the term "Vocollect"  
2       in my review, sir.

3           Q.       Did you know that the Vocollect was a  
4       computerized inventory system that kept constant  
5       up-to-date count of everything in inventory when  
6       you prepared your report? Were you aware of that?

7           A.       I was aware that they had an internal  
8       system that was -- that was keeping track of  
9       inventory. I don't recall it being called the  
10      Vocollect.

11          Q.       Do you see that -- DEA then describes  
12      the Vocollect system as it "directs users via  
13      headset to the location and quantity of each item  
14      to select. As the selector is picking, they can  
15      scan the NDC bar code of the item to ensure that  
16      the exact item is being selected. (This is  
17      repeated for all items until all total units are  
18      selected.)

19                    "These tasks are completed one  
20      customer at a time. The controlled substances are  
21      placed inside a Number 2 [sic] white paper bag with  
22      a pick list attached to the outside of the bag for  
23      ease of customer verification upon delivery. Upon  
24      generic -- upon completion of the tasks inside the  
25      cage, the tasks are combined with the generic drug

1 tasks and consolidated into the fewest shipping  
2 cartons/totes as possible."

3 Now, as described, you would agree  
4 that this sounds like a very sound inventory  
5 control system, correct?

6 MS. KNIGHT: Object to the form.

7 A. I don't know if I would characterize  
8 it as sound. It is an inventory control system.

9 Q. (BY MR. LIVINGSTON:) Well, do you  
10 think it is a bad system?

11 A. No. I just think it is a system.

12 Q. Well, isn't it better than most of  
13 the systems that you found that distributors had  
14 when you did your inspections? How many of them  
15 had a computerized system like this that kept an  
16 up-to-the-second count of everything in inventory?

17 MS. KNIGHT: Object to the form.

18 A. I think most had that capability.

19 Q. (BY MR. LIVINGSTON:) And then under  
20 "Inventory Controls," Giant Eagle doubles down. It  
21 says, "In addition to the self-scan audit during  
22 selection, HBC performs random audits of at least  
23 ten percent of the total tasks being completed.  
24 After all selections complete, HBC cyclic counts  
25 all controlled substances daily as the business is

1 run and always prior to selecting a new billing  
2 cycle. All discrepancies are researched thoroughly  
3 in attempt to find the variance."

4 Now, the DEA regulations only require  
5 biannual inventory counts, correct?

6 A. That is the regulatory requirement,  
7 yes, sir.

8 Q. Okay. So here we have the DEA  
9 regulation says that only every two years you have  
10 to do what Giant Eagle does every day, correct?

11 MS. KNIGHT: Object to the form.

12 A. Well, the regulations require that a  
13 registrant conduct a biannual inventory, and it has  
14 a specific way that it is recorded to the DEA. It  
15 doesn't prohibit registrants from doing other  
16 audits or inventories. Generally, states require  
17 more often. And generally speaking, in my  
18 experience, most of the distributors had an almost  
19 daily audit or reaudit of their controlled  
20 substances. That was pretty common in the  
21 industry.

22 Q. (BY MR. LIVINGSTON:) That wasn't my  
23 question, sir. I just asked about the DEA  
24 regulations. As compared to the DEA regulation,  
25 you would agree that Giant Eagle actually far

1 exceeded the minimal requirements that are included  
2 in the DEA regulations with respect to inventory  
3 counts?

4 A. They conducted inventories more often  
5 than biannually, yes, sir.

6 Q. Would you at least -- maybe at least  
7 on inventory, would you give Giant Eagle an A?

8 MS. KNIGHT: Object to the form.

9 A. Well, I don't know if I would grade  
10 them. But as I stated, that was pretty common in  
11 the industry with electronic systems, that they  
12 would do a daily accountability as part of their --  
13 I don't know if it was their security program, but  
14 it was definitely part of their accountability  
15 internally.

16 Q. (BY MR. LIVINGSTON:) I would like to  
17 go to the last sentence on this paragraph. It  
18 says, "The Pharmacy Merchandizing group notifies  
19 all customers to search for any discrepancy with  
20 their inbound order." Did you know that the  
21 Pharmacy Merchandising group was at Giant Eagle's  
22 corporate headquarters?

23 A. I don't know if I was aware  
24 specifically where they were located.

25 Q. Well, doesn't this tell you that

1 Giant Eagle's corporate offices were overseeing  
2 inventory control at the HBC warehouse, that it was  
3 another check on what was going on at that  
4 warehouse?

5 MS. KNIGHT: Object to the form.

6 A. Well, I think it is a little broader  
7 than that. Because once the drugs are received by  
8 the pharmacy, it is not just whether or not that  
9 they have been properly packaged; it is whether any  
10 of them have been lost in transit. So this is  
11 another area that is pretty typical for  
12 distributors, to make sure that there's any kind of  
13 loss, theft or loss of the product.

14 The next section talks about a third  
15 party courier service, so that probably heightens  
16 the necessity for that type of review on an order.

17 Q. (BY MR. LIVINGSTON:) All right. I  
18 would like to now turn to Page 30485, which is Page  
19 40 at the top, if it is easier for you. And you  
20 see that this is another --

21 A. Hold on one second.

22 MS. KNIGHT: Just a moment,  
23 Mr. Livingston.

24 A. Okay. I am there.

25 Q. (BY MR. LIVINGSTON:) Okay. Do you

1 see that this is another report of another  
2 investigation and this report was prepared in  
3 August of 2013?

4 A. I see that.

5 Q. And do you see that this report was  
6 prepared by a different DEA agent than the prior  
7 report that we just looked at, correct?

8 A. I do.

9 Q. Okay. And then we see the same  
10 language that the case was closed after the cyclic  
11 investigation. And we had not only Mr. Conlon  
12 involved this time, but we have got Mr. Sousa  
13 involved. Do you see that?

14 A. I do.

15 Q. If you skip down to the very bottom,  
16 I just want to see where the signature line is.  
17 There's a signature by Mr. Conlon, and then there's  
18 also it says "Approved, Kurt Dittmer." And GS  
19 stands for group supervisor, correct?

20 A. Yes.

21 Q. Would it be fair to say that every  
22 inspection report had to have a sign-off by the  
23 group supervisor?

24 A. That would be typical.

25 Q. And what would the group supervisor

1 do, if anything, before signing off on an  
2 inspection report?

3 MS. KNIGHT: Object to the form.

4 A. I'm not sure I could comment on what  
5 Mr. Dittmer was. Generally speaking, they should  
6 review their report.

7 Q. (BY MR. LIVINGSTON:) Right. And  
8 would they talk to the agents who were boots on the  
9 ground during the inspection?

10 MS. KNIGHT: Object to the form.

11 A. I don't know what Mr. Dittmer did or  
12 how he handled his office.

13 Q. (BY MR. LIVINGSTON:) I'm not. I'm  
14 asking generally about group supervisors, who I  
15 assume you reported to a group supervisor during  
16 your tenure at the DEA, correct?

17 A. I did.

18 Q. Okay. So I am talking about group  
19 supervisors generally. Would you sometimes talk to  
20 your group supervisor before he or she signed off  
21 on your report?

22 A. Sometimes, but not always, because  
23 the report would always go through and be reviewed.

24 Q. If you look at the highlighted  
25 portion here, it says that "This investigation



1 revealed no discrepancies with respect to  
2 recordkeeping or security. Therefore, this case is  
3 closed." So you would agree that this is another  
4 finding that Giant Eagle is in compliance with the  
5 DEA regulations, including the SOM regulation,  
6 correct?

7 MS. KNIGHT: Object to form.

8 A. I can't draw that conclusion without  
9 looking at the report. The next page on 2, I  
10 looked -- glancing at the enclosures, I don't see a  
11 policy or a procedure for the SOMS. So that is a  
12 little concerning. I would expect to see that. So  
13 I don't know if we are going to get into the  
14 content of the report.

15 Q. Yeah, we are going to. Let's turn to  
16 next page, Page 42. It says, "Subject Firm's  
17 Background." Do you see in the middle of the first  
18 paragraph it says, "The subject firm distributes  
19 general merchandise, health and beauty aids,  
20 over-the-counter products containing List 1  
21 chemicals and Scheduled II to V controlled  
22 substances to approximately two hundred twenty  
23 Giant Eagle supermarkets located in Pennsylvania,  
24 West Virginia and Ohio"?

25 Now, you see here that these agents

1 thought it was, you know, important to know that  
2 Giant Eagle wasn't a McKesson type distributor but  
3 rather a self-distributor, correct?

4 MS. KNIGHT: Objection to form.

5 A. I don't know that's the purpose for  
6 the comment. I think it is just part of preparing  
7 a report, to give a base of information about the  
8 registrant.

9 Q. (BY MR. LIVINGSTON:) But why include  
10 that information if it is not important? Why would  
11 you want to know whether they distribute to Giant  
12 Eagle supermarkets or maybe Giant Eagle's HBC  
13 supplying Rite Aid? I mean why wouldn't you -- why  
14 would you note that if it is not important?

15 A. Well, I think it is important. But I  
16 believe your statement was it was put on this  
17 report to make a comparison to other larger  
18 distributors. I think it is just a good  
19 description of the registrant that is being  
20 investigated. Maybe I misunderstood your earlier  
21 statement.

22 Q. Okay. And let me just ask you,  
23 typically, what percentage of a distributor like a  
24 McKesson or, you know, I don't know,  
25 AmerisourceBergen, Cardinal, what percentage of

1       their business involves controlled substances?

2               A.       I am not going to guess on that. I  
3       have some general ideas, but I don't have a direct  
4       recollection of a specific number.

5               Q.       Well, just roughly. I mean you have  
6       rendered opinions on those poor folks in a number  
7       of different cases, right?

8                       MS. KNIGHT: Objection to form.

9               A.       Under ten percent would be, I  
10      believe, a good estimate, but that is just an  
11      estimate.

12              Q.       (BY MR. LIVINGSTON:) Okay. Well,  
13      there's a notation here that HBC had a hundred and  
14      fifty-seven million dollars in sales in 2012, of  
15      which controlled substances accounted for less than  
16      one percent.

17              A.       It does say that. I just point to  
18      your attention that that is of all products, not  
19      just controlled substances.

20              Q.       Yeah, right, all products and  
21      controlled substances are for less than one  
22      percent. And I asked you the same question with  
23      respect to McKesson, and you said less than ten  
24      percent, correct?

25              A.       Yeah. But mine would be in relation

1 to the handling of drugs, noncontrolled and  
2 controlled. I don't know what it would be relative  
3 to all products.

4 Q. Right. But you would agree that  
5 HBC's bread and butter wasn't controlled  
6 substances?

7 MS. KNIGHT: Objection to form.

8 A. I never looked at the financials to  
9 see how profitable it was, so I --

10 Q. (BY MR. LIVINGSTON:) But you are  
11 seeing it right now. I'm understand you haven't  
12 seen it before, but now you have seen it. We  
13 know -- we have already established that you didn't  
14 take the time to review these inspection reports  
15 before you rendered your opinion.

16 But you are seeing this right now on  
17 the screen that they did a hundred fifty-seven  
18 million dollars in business in 2012 but less than  
19 one percent of that was controlled substances. You  
20 would agree that that was not how HBC, you know, it  
21 wasn't a primary part of its business?

22 MS. KNIGHT: Objection to form.

23 A. When I look at that statement, I'm  
24 concerned of whether it is one percent of the  
25 hundred and fifty-seven million or it is one

1 percent of their business. So I don't know exactly  
2 what that statement is trying to say.

3 Q. (BY MR. LIVINGSTON:) And just again  
4 for the jury's benefit, HBC is just an operating  
5 division. It is not even a legal, separate legal  
6 entity from Giant Eagle, right?

7 A. I believe so, yes.

8 Q. Okay. And so -- and HBC, when they  
9 were acting as a distributor, would order drugs  
10 from, let's say, a manufacturer of opioids. And  
11 those drugs would be -- would be delivered to HBC's  
12 warehouse and that -- and that is when title would  
13 pass from the manufacturer to Giant Eagle, correct?

14 MS. KNIGHT: Objection to form.

15 A. Once they received a shipment, then  
16 that is -- in DEA terms, that is when they take  
17 title of the controlled substances.

18 Q. (BY MR. LIVINGSTON:) Okay. And  
19 because Giant Eagle owns and operates both HBC and  
20 its own pharmacies, title to those drugs does not  
21 pass when HBC ships those drugs to one of Giant  
22 Eagle's pharmacies, correct?

23 A. Well, so my answer in general to that  
24 would be they would still be under control of the  
25 corporate HBC. But in the DEA world -- so I'm not

1     sure exactly your question. But in the DEA world,  
2     once it passes from one registrant to the other  
3     registrant and it is accepted at the pharmacy  
4     level, then the pharmacy has title of those drugs  
5     for the -- only for the concerns of the DEA.

6             Q.       All right. But legal title, legal  
7     ownership of those drugs does not pass when HBC  
8     merely ships the drug to one of Giant Eagle's  
9     pharmacies?

10            MS. KNIGHT: Objection to form.

11            A.       I don't know that I can make a --  
12     give a legal opinion on that.

13            Q.       (BY MR. LIVINGSTON:) Well, you have  
14     been giving legal opinions all day about whether  
15     Giant Eagle was in compliance with the DEA  
16     regulations. But you won't tell me whether or not  
17     title passes when Giant Eagle ships its drugs from  
18     its own warehouse to its own pharmacies?

19            MS. KNIGHT: Objection to form and  
20     asked and answered.

21            A.       Mr. Livingston, I don't give -- mine  
22     isn't a legal opinion. Mine is an opinion whether  
23     there's compliance with the regulations. It is  
24     not -- I am not rendering a legal opinion.

25            Q.       (BY MR. LIVINGSTON:) But the

1 regulations, that is a law, isn't it?

2 A. It is. But I'm not saying --

3 Q. You are saying whether Giant Eagle  
4 complied with the law.

5 MS. KNIGHT: Mr. Livingston, you need  
6 to let him finish his answer.

7 A. I'm not -- I'm not offering a legal  
8 opinion.

9 Q. (BY MR. LIVINGSTON:) All right.  
10 Would you go to Page 52 at the top, which is 30497  
11 at the bottom, the number. All right. You see  
12 under the heading "Due Diligence: There's a  
13 discussion between the DEA inspectors and the  
14 manager of HBC, Matt Rogos. And he "advised the  
15 investigators that, unlike other drug  
16 distributorships, HBC has only one customer, Giant  
17 Eagle Pharmacies. All orders for controlled  
18 substances are made via dedicated Giant Eagle  
19 pharmacy computer systems whereby only pharmacists  
20 can place electronic orders for Schedule III  
21 through V controlled substances." Did you know  
22 that when you did your report?

23 A. Yes, sir.

24 Q. And he goes on to say, "Rogos advised  
25 that at the store level, the pharmacist placing the

1 order may not be the pharmacist on duty when the  
2 order is received. When orders are received at the  
3 pharmacy, it is the responsibility of a pharmacist  
4 and a pharmacy technician to enter controlled  
5 substances into the pharmacy inventory."

6 And then Mr. Conlon provided Rogos  
7 with the cite to your favorite regulation, the SOM  
8 regulation, 1301.74(b). And then he quotes --  
9 which is quoted here. Do you see that?

10 MS. KNIGHT: Objection to form.

11 A. I do.

12 Q. (BY MR. LIVINGSTON:) If you skip  
13 down a little bit, it says, "Rogos advised at this  
14 time HBC and/or Giant Eagle, Inc., its parent  
15 company, has no computerized software system to  
16 indicate that an order may be suspicious. Rogos  
17 advised that if a Giant Eagle pharmacy were to  
18 receive unusually high orders of controlled  
19 substances from HBC, deviating from other stores,  
20 it would be noticed at the Giant Eagle headquarters  
21 level.

22 "Rogos stated that he will bring this  
23 issue to the attention of Greg Carlson and Kim  
24 Remas of Giant Eagle's headquarters Controlled  
25 Substance Purchasing Unit."



1                   So you see that Mr. Rogos is advising  
2                   and describing to the DEA inspectors that Giant  
3                   Eagle had a manual system at the time for  
4                   identifying suspicious orders in compliance with  
5                   1301.74(b) .

6                   MS. KNIGHT:   Objection to form.

7                   A.           This statement that you highlighted  
8                   here, I would agree that it is manual and it only  
9                   identifies orders of unusual high orders.   I don't  
10                  know what "high" means unless it means by size.   It  
11                  does not say any compliance with pattern or  
12                  frequency.   And then the last statement is -- I am  
13                  concerned by what issue is going to be brought to  
14                  the attention of Mr. Carlson and Ms. Remas.

15                  Q.           (BY MR. LIVINGSTON:)   Yeah, we are  
16                  going to get there in a second.

17                  A.           Okay.

18                  Q.           Before we do -- and you yourself have  
19                  approved or at least found a manual system, a  
20                  manual SOM system to be in compliance with the SOM  
21                  regulation, correct?

22                  A.           Based on the business activity and  
23                  the scope of the that registrant, that is a correct  
24                  statement.

25                  Q.           Okay.   Lets go to the next page of

1 this document, 30498, Page 53 at the top. It says  
2 "Meeting With Management." Again, this is  
3 something that Investigators Conlon and Sousa were  
4 do. They were able to meet with Mr. Rogos. That  
5 is not something that you did, correct?

6 A. That's correct.

7 Q. And it says, "During this meeting,  
8 investigators advised Rogos that both recordkeeping  
9 and security are in full compliance with the  
10 requirements set forth in Title 21 Code of Federal  
11 Regulations." And 21 Code of federal regulations  
12 includes the SOM regulation, correct?

13 A. Yes.

14 Q. Okay. And then they said,  
15 "Investigator Conlon advised Rogos to develop a  
16 better system of due diligence." Do you see that  
17 recommendation that he made to Giant Eagle?

18 A. I do. Which kind of contradicts the  
19 earlier statement.

20 Q. Well, why would it contradict it  
21 since you just testified under oath a couple of  
22 times that a manual system can be in full  
23 compliance with the SOM regulation?

24 A. I did. But I didn't state in my  
25 description that they should do better due

1 diligence. I said they had good documentation of  
2 due diligence. I don't know that a registrant  
3 could be in full compliance and at the same time  
4 get a corrective statement like that in the report.

5 I guess that may go back to the  
6 earlier statement where they -- that I brought up  
7 where they are going to notify management.

8 Q. And you know -- okay. Just to orient  
9 ourselves, the date of this meeting with management  
10 or this investigation and report is August of 2013,  
11 correct?

12 A. That's correct.

13 Q. And isn't it true, sir, that in your  
14 own report, you indicate that by the fall, late  
15 fall of 2013, Giant Eagle had begun to use an  
16 automated computerized threshold system to go along  
17 with its manual SOMS system?

18 A. Yes, sir, mid October.

19 Q. Okay. So within two months, Giant  
20 Eagle acted on this recommendation that they  
21 received from Investigator Conlon, correct?

22 MS. KNIGHT: Object to the form.

23 A. I don't know that that was a reaction  
24 to this. I didn't see a criticism of the manual  
25 system, just a criticism of the due diligence.

1 But also, going to the three times  
2 twelve-month company average didn't answer the  
3 issue I brought up about the unusual frequency or  
4 pattern. I do not believe that system monitored  
5 that aspect either.

6 Q. (BY MR. LIVINGSTON:) Go back to the  
7 previous page at the very bottom.

8 A. Yes.

9 Q. At the very bottom, Mr. Rogos says  
10 that he will bring this issue to the attention of  
11 Greg Carlson and Kim Remas of Giant Eagle's  
12 headquarters.

13 A. Yes.

14 Q. And then within two months after he  
15 brings this issue up, Giant Eagle has for the first  
16 time a computerized SOMS system, correct?

17 MS. KNIGHT: Objection to form.

18 A. Mr. Livingston, what do you believe  
19 "issue" is in that statement?

20 Q. (BY MR. LIVINGSTON:) Yes or no that  
21 within two months after Mr. Rogos stated that he  
22 would bring this issue up to corporate management,  
23 Giant Eagle had in place, in operation a  
24 computerized threshold SOMS system?

25 MS. KNIGHT: Object to the form.

1           A.       If we are just talking about the  
2 facts and the date of this inspection, I would  
3 agree two months later there was a change to the  
4 SOMS. I don't agree that that statement there is  
5 the result or cause -- doesn't -- isn't significant  
6 enough to me to say that that was the result of the  
7 inspection.

8           Q.       (BY MR. LIVINGSTON:) Why don't we go  
9 to Exhibit 35.

10                   (GE Exhibit 35 was marked for  
11 identification.)

12           Q.       (BY MR. LIVINGSTON:) And this  
13 exhibit, when you get there --

14           A.       I am there.

15           Q.       Okay. This was an Exhibit 16 to  
16 Mr. Colosimo's deposition. You did not read this  
17 exhibit, correct?

18           A.       I don't recall it, sir.

19           Q.       Okay. And this is an email, a couple  
20 of emails. If you go to the bottom there, it is an  
21 email from Kayla Voelker at Giant Eagle who -- a  
22 number of folks within the company who are a part  
23 of the pharmacy team. You know, you have cited  
24 Mr. Chunderlik. And, you know, you are familiar  
25 with some of these names and Mr. Carlson and so

1     forth, correct?

2             A.       Yeah, I have read some of these  
3     depositions, yes, sir.

4             Q.       And do you see that -- again, this is  
5     only November of 2013. She says, "We have had two  
6     pharmacies exceed the purchasing thresholds for  
7     certain controlled products so far this month." So  
8     certainly by this point in time, which was, you  
9     know, early to mid November of 2013, Giant Eagle  
10    clearly has a threshold system in place, correct?

11            A.       According to the records, yes, sir.

12            Q.       And then if you go up to the  
13    responsive email, it says, "Joe, please respond to  
14    these questions in regard to your request for an  
15    increase in narcotic order points. The adjustment  
16    in order points will be based on this data."

17                   And then it has a number of criteria.  
18    It has, "Has your store experienced an overall  
19    increase in prescription volume compared to last  
20    year? If so, what is the percentage increase? Has  
21    your pharmacy had an acquisition within the last  
22    year? Has a new physician practice opened in your  
23    geographic location within the last year?

24                   "Do you have a patient or multiple  
25    patients that require these drugs? Is your

1 pharmacy located near a hospital or a facility that  
2 specializes in these drugs?" And then sort of a  
3 catchall, "Other reasons that may justify raising  
4 the monthly ordering controlled substance  
5 threshold?"

6 You would agree that these are very  
7 sound and good due diligence questions to ask?

8 MS. KNIGHT: Object to form.

9 A. I think they are some good questions,  
10 but the issue at this time period is that these  
11 orders have already shipped. They haven't been  
12 held by the system and they had already been  
13 shipped. So this is post-distribution where they  
14 are asking these questions. And I don't see a  
15 pharmacy number or what area, but I don't recall  
16 seeing a document that responded to these specific  
17 questions and whether they were subsequently  
18 followed up when the pharmacist responded.

19 Q. (BY MR. LIVINGSTON:) Well, let's go  
20 back to Exhibit 53. And Exhibit 53 is the one that  
21 you never reviewed, but this is the one that  
22 clearly indicates that Giant Eagle was halting  
23 shipment of orders until it was able to investigate  
24 a potentially suspicious order, correct?

25 A. Say that one more time, please.

1           Q.       Yeah, does it -- we just went over  
2       this. I am just trying to -- you know, you said  
3       that Giant Eagle's system couldn't block orders.  
4       But this email suggests otherwise, right? It says,  
5       "This item is a controlled substance, so we will  
6       not be shipping this until it is verified" --

7                   MS. KNIGHT: Object to the form.

8           Q.       (BY MR. LIVINGSTON:) -- "that this  
9       is what the store should actually be receiving,"  
10       right? We just went over this about twenty minutes  
11       ago, right?

12           A.       We did. And the same answer is that  
13       I don't know that this has been blocked by the  
14       system, but I agree that it has been held for some  
15       reason by the company.

16           Q.       You don't know a lot of things. Yet  
17       the one thing you appear to know is for some reason  
18       you are certain about your conclusion that Giant  
19       Eagle had a subpar SOMS system, right?

20                   MS. KNIGHT: Objection to form.

21           A.       Yes, I did have an opinion of that.

22           Q.       (BY MR. LIVINGSTON:) You don't know  
23       what you reviewed, you can't remember which  
24       depositions, which exhibits, yet you are able to  
25       conclude with moral certainty that Giant Eagle's



1 SOMS system was deficient, correct?

2 MS. KNIGHT: Objection to form.

3 Argumentative.

4 A. Yes. Based on my review of all the  
5 documents and information related to Giant Eagle, I  
6 was able to form an opinion that they did not meet  
7 the maintenance of effective controls to prevent  
8 diversion of controlled substances and did not have  
9 a proper Suspicious Order Monitoring System. That  
10 is a correct statement. That is what my opinion  
11 found.

12 Q. (BY MR. LIVINGSTON:) And what is  
13 also a correct statement is that in rendering that  
14 opinion, you didn't even bother to look at the  
15 inspection reports over a fifteen-year period for  
16 Giant Eagle that your DEA colleagues -- wherein  
17 your DEA colleagues concluded that Giant Eagle was  
18 in full compliance at all times with the  
19 regulations that you now suggest Giant Eagle was  
20 not in full compliance with, correct?

21 MS. KNIGHT: Objection to form.  
22 Misrepresentation or mischaracterization of the  
23 evidence.

24 A. I think the last DEA-6 that we  
25 reviewed together would show they were not in full

1 compliance.

2 Q. (BY MR. LIVINGSTON:) That is not  
3 what the report says.

4 A. The reports says that they needed to  
5 do a better job at doing their due diligence. They  
6 did come to the conclusion that it was in  
7 compliance, but I believe contained within the  
8 report it kind of is contradicted by some of the  
9 statements. And whatever the issue is that they  
10 are reporting to their headquarters, I would say  
11 that there was some obvious issues there. I don't  
12 know that they are clearly stated in the report.

13 MS. KNIGHT: Counsel, we have been  
14 just over an hour. Is this a good stopping point  
15 for a break?

16 MR. LIVINGSTON: Yes.

17 THE VIDEOGRAPHER: We will go off the  
18 record at 10:27.

19 (Whereupon, a break was had from  
20 10:27 a.m. until 10:38 a.m. EDT)

21 THE VIDEOGRAPHER: We are back on the  
22 record at 10:38.

23

24 EXAMINATION BY MR. BEISELL:

25 Q. Mr. Rafalski, my name is Patrick

1 Beisell. I am with Jones Day. I represent  
2 Walmart. I will be really quick. And honestly,  
3 I'm sorry to ask these questions. Just a few  
4 cleanup questions for you.

5 So yesterday you were asked about  
6 whether you had any conversations with Dr. McCann  
7 about your Track 3 report. Do you remember that?

8 A. I did.

9 Q. And correct me if I am wrong, but you  
10 testified yesterday that you had a few  
11 conversations but you could only really recall one  
12 and it was a telephone conversation. Does that  
13 sound right?

14 A. Well, I think the question was  
15 specific to CT3.

16 Q. Yes, it was.

17 A. Okay. So it would have been one  
18 prior to the submission of my report and one after.  
19 But I think I also said -- I may have also said  
20 over the course of the litigation I have had  
21 numerous discussions with him.

22 Q. Sure. So to be clear, regarding  
23 Track 3, Lake and Trumbull County, you had a few  
24 conversations, but you could really only recall one  
25 before the submission of your report, correct?

1           A.       Yeah, direct -- I don't -- in regards  
2       to that, it is not a few. It was one prior and one  
3       after.

4           Q.       Okay. Great. And the one prior to  
5       your report was about an hour, and it was a  
6       telephone conversation; is that right?

7           A.       At least an hour, yes, sir. It was a  
8       Zoom conference.

9           Q.       Okay. That was actually where I was  
10      going to go. Because, you know, the pandemic has  
11      changed the way that we think about things. So  
12      when you said telephone conversation, I wanted to  
13      be clear. Were there any other kinds of  
14      conversations that you had, maybe Zoom conferences  
15      or other telephonic conferences with Mr. McCann?

16          A.       No, sir.

17          Q.       It's just the one?

18          A.       Yes, sir.

19          Q.       Okay. And I believe you talked about  
20      the methodology that was the primary focus of the  
21      conversation was the thirty-day trailing?

22          A.       That is the one point I remember we  
23      discussed the most, but I think there were some  
24      other general discussions about some of the charts  
25      and some of the data. But I specifically remember

1 the thirty-day trailing was the primary discussion.

2 Q. Okay. During that call, did  
3 Dr. McCann ever show you a flagged order or give  
4 you an example of a flagged order?

5 A. I don't recall that.

6 Q. Okay.

7 A. The triggering, I don't recall him  
8 showing me -- I don't recall any kind of  
9 demonstratives put on the screen during the  
10 discussion.

11 Q. So other than the thirty-day  
12 trailing, do you remember anything else  
13 specifically about that hour-or-so Zoom telephone  
14 call that you had?

15 A. I think some of the charting and the  
16 time frames confirming the ARCOS time period and  
17 nonARCOS data, I remember some general discussions  
18 about that. But specific to the other  
19 methodologies, I think there was some discussion  
20 on -- no, I am thinking of something different.  
21 No, that is generally it. I mean I'm sure there  
22 was something, other things discussed relating to  
23 my report, but the things I remember most are what  
24 I have already stated.

25 Q. Good. Thank you. Related to

1 Dr. McCann and the methodologies, did you ask him  
2 by chance to run any other methodologies beyond the  
3 seven that appear in your report?

4 A. No. I did not.

5 MR. BEISELL: Let's see how much time  
6 do I have. Am I doing all right?

7 Q. (BY MR. BEISELL:) You mentioned a  
8 couple of times today and yesterday that you ran  
9 some searches to look for documents. Do you recall  
10 that?

11 A. Yes, sir.

12 Q. Okay. How did you -- well, let me  
13 back up. What database did you use to run these  
14 searches, if any?

15 A. I do some in Relativity, but I am not  
16 very good at searches there because I get so many  
17 hits it is mind-boggling.

18 Q. Complicated.

19 A. Then the documents are dropped into a  
20 Google Drive for me, so I can search the documents  
21 first easiest by Bates number and then by content  
22 in my Google Drive.

23 Q. So let me make sure that I understand  
24 that. You have access to a Relativity database --

25 A. I do.

1           Q.       -- that you can -- that you can  
2       search on your own anytime you want?

3           A.       Correct. And to supplement that is I  
4       have one of the attorneys primarily when I want to  
5       do a search, because my confidence isn't that high  
6       with my abilities in Relatively, I would ask him to  
7       do searches. Either generally I would call him or  
8       sometimes I am actually in person. I don't  
9       remember if CT3 that occurred, but I would be more  
10      reliant on his searches because his ability is much  
11      greater than mine.

12          Q.       Who is that person?

13          A.       Mr. Elkins.

14          Q.       Mr. Elkins. And would you like give  
15      Mr. Elkins the search that you wanted to run?

16          A.       Yes. Some very specific. So, for  
17      example, I could be reviewing a document. I think  
18      in regards to Walmart, I think there was -- one I  
19      recall off the top of my head was there was a DEA  
20      inspection and there were subsequent questions. I  
21      think it was 2014.

22                   And my first search of my documents,  
23      I believed there had to be more documents, so I  
24      searched. And then I had Mr. Elkins search, and  
25      that uncovered more documents, which then led to

1 another search. So sometimes I just read some  
2 documents and it seems like there should be more.  
3 And that is how those searches would occur.

4 I don't -- I don't rely a lot on  
5 Relativity because I generally get like a quarter  
6 million hits every time I do a search. And I  
7 haven't received a lot of training and use on it,  
8 and it is a difficult search.

9 Q. Sure. I mean I have been doing it  
10 for years, and I still struggle with it. To be  
11 clear, would it be fair to say that the majority of  
12 the searches then happens not in Relativity by you  
13 but in Relativity by Mr. Elkins and/or in the  
14 Google database that you mentioned?

15 A. Yeah. I do a lot of the Google  
16 database searches. Of course, that is dependent on  
17 the documents being in the Google database. And  
18 that sometimes leads me to then secondarily go to  
19 Mr. Elkins and ensure that those documents are --  
20 have been dropped into my Google Drive. And I  
21 think that's -- I don't want to speak for  
22 Mr. Elkins, but that is the process.

23 Q. Sure. And the Google Drive is  
24 populated by documents that Mr. Elkins puts in  
25 there, or who puts in the document?



1           A.           Primarily, Mr. Elkins does it. I  
2     don't know who -- how they get to Mr. Elkins, you  
3     know, through discovery or whatever. But he is my  
4     primary contact that drops the documents in Google  
5     Drive.

6           Q.           Yeah. And the Google Drive  
7     documents, that is just a small selection of  
8     documents as compared to the Relativity database,  
9     right?

10          A.           Well, yes. Because like in CT1,  
11     there was five million or over documents. They are  
12     not all in my Google Drive. I don't think it  
13     probably has that capability but -- and I don't  
14     need to see -- there's a multitude of documents  
15     that I don't need to see relative to my opinion.

16                    You know, I am basically looking at a  
17     certain range or type of documents and not looking  
18     at sales data or any -- some of that other  
19     information that I don't use in my opinion.

20          Q.           Do you know approximately how many  
21     documents are in the Relativity database that you  
22     have access to? Any idea?

23          A.           No. One time I heard it was over  
24     five million. I know I do searches a lot of times  
25     where it is an astronomical number. But

1 specifically -- and I don't know that my Relativity  
2 access has the full access that other people have.  
3 I don't know exactly how Relativity works but just  
4 generally speaking.

5 Q. Does the Relativity database include  
6 the Track 1 documents that you mentioned as well as  
7 this litigation, the Track 3 documents?

8 A. Track 1 is where I used it the most  
9 at the beginning and had the most frustration so --  
10 and I get different accesses through different  
11 litigations too. I had a different access through,  
12 I believe, the New York case that I worked on.

13 Q. Sure. Sure. Just a couple more  
14 questions about the searches that you ran, not that  
15 Mr. Elkins ran, but that you ran.

16 So say, for example, that you wanted  
17 to run a search for suspicious orders. How would  
18 you go about running that search? Walk me through  
19 it. In Relativity.

20 A. Oh. Well, I used the drop-downs, and  
21 I tried to put in search terms and go specifically  
22 by company. Those were always frustrating because  
23 I would get so many hits. So a search like that, I  
24 would rely on Mr. Elkins, confident that his search  
25 would be much more comprehensive than I could do.

1 I found scrolling through documents  
2 after documents not a waste of time, but I just  
3 couldn't hit like a very specific search. I didn't  
4 have the ability to do that.

5 Q. True. So just to like put a fine  
6 point on it, if you were searching for Walmart  
7 suspicious orders, if I understand you correctly,  
8 you would run a search that says "Walmart" and  
9 "suspicious orders." And then you would get  
10 thousands and thousands of documents. So you would  
11 ask Mr. Elkins, "Can you identify for me documents  
12 that hit on these terms?" Or how would that work,  
13 that second part?

14 A. Well, as time went on, in dealing  
15 with Mr. Elkins and the plaintiffs' lawyers, they  
16 have a pretty good idea of exactly the documents I  
17 want. So they are dropped in there, and some of  
18 them now are actually disclosed in discovery, the  
19 range of documents. So it is not -- at the  
20 beginning, it was the entire database. Everything  
21 was just dumped in there, and it was like a giant  
22 box. And I was trying to find documents.

23 The discoveries now is providing a  
24 much more comprehensive, so it is easier to do  
25 searches or for me to look at Bates numbers and be

1     confident that I have those documents. I rely on  
2     the discoveries now a lot more and what they are  
3     listing.

4                     So but as I am doing searches,  
5     there's always times when I will see a document and  
6     I will ask for a further search. You know, there's  
7     always a concern I miss a document because there's  
8     just so many.

9                     And I believe, in my recollection, I  
10    can restrict the searches a little bit more, so I  
11    could look for emails for suspicious orders,  
12    different types of documents. Or when I scroll  
13    down through Relativity, it tells me what kind of  
14    documents they are, whether it is an email or a  
15    spreadsheet or something like that.

16                    Q.     Got you. I just want to be clear  
17    about the second part because I am not quite sure  
18    that I got a good answer on that. So taking the  
19    example of Walmart and suspicious orders, how would  
20    you instruct Mr. Elkins to search for you? Would  
21    you give him a specific search or would you just  
22    ask him a topic and trust him to search the right  
23    way?

24                    A.     Both.

25                    Q.     Does that make sense?

1           A.       Yes. Both. Depending on --  
2       depending if I see a document that references  
3       specifically a date or an act or something.  
4       Generally sometimes it is an email. In my  
5       testimony today, there was an email where it talked  
6       about do a follow-up. And so I would think there  
7       may be a document that might be subsequent to that  
8       email where the follow-up occurred.

9                    So I would provide him the Bates  
10       number and the date and also the parties on the  
11       email. And I would ask him to do a search to see  
12       if there was any kind of a memo or response or  
13       document or anything related to that.

14                   Most of my searches are subsequent to  
15       some of the documents I receive which, of course,  
16       are generated originally by Mr. Elkins.

17           Q.       Got it. And then how confident are  
18       you that the Relativity database or even the Google  
19       database that you used contains documents other  
20       than those produced by the defendants in Track 3?  
21       So, for example, do you think that you had access  
22       to documents produced by the DEA?

23           A.       In Relativity, I don't recall seeing  
24       any, but I don't know whether they -- how they are  
25       dropped in there or if they are accessible by me.

1 But I know that they are provided by Mr. Elkins.

2 Q. What about deposition exhibits, did  
3 you have Relativity access to that where you could  
4 just search across exhibits?

5 A. All of those have always been put  
6 into Google Drive with the exhibits.

7 Q. And the Google Drive -- I promise  
8 this will be my last question. And the Google  
9 Drive, how do you search in Google Drive?

10 A. I can search by Bates number. I can  
11 also just search by a key term.

12 Q. Just control F is what we are talking  
13 about?

14 A. Up at the top of the Google Drive  
15 there's a search parameter. So I will open it up  
16 to a specific folder. I have multiple folders for  
17 multiple reports. So I will go into that specific  
18 folder like CT3. I may narrow it first to the  
19 folder for a company, and then I may broaden it  
20 just to all the documents in CT3. And then I may  
21 find some documents, or I generally would find  
22 documents or, if I don't, then I would do a  
23 secondary request through Mr. Elkins.

24 MR. BEISELL: Thank you,  
25 Mr. Rafalski. I think that is all I have, unless

1 any of my colleagues have anything else. I think  
2 we have got a few minutes left.

3 MS. KNIGHT: I don't believe that is  
4 true. Where are we on the time, Justin?

5 THE VIDEOGRAPHER: Been on the record  
6 for just thirteen minutes.

7 MS. KNIGHT: That would be right  
8 about the time.

9 MR. BEISELL: Yeah. Thank you for  
10 your time, Mr. Rafalski.

11 A. Yeah, thank you.

12 MS. KNIGHT: All right.  
13 Mr. Rafalski, I have a few questions for you.

14  
15 EXAMINATION BY MS. KNIGHT:

16 Q. You testified yesterday --

17 MR. BEISELL: I'm sorry, Kathleen, I  
18 didn't mean to interrupt you. I just wanted to  
19 point out while you are doing your direct or cross  
20 or whatever it is of Mr. Rafalski, just so that we  
21 don't keep running over each other, I think we are  
22 going to have Scott do the objections for the  
23 entire defense group, if that is all right.

24 MS. KNIGHT: I have no objection to  
25 that. Give us one second. There's some folks in

1 the hallway.

2 Q. (BY MS. KNIGHT:) All right.

3 Mr. Rafalski, you testified yesterday that your  
4 opinions in this case were limited to the  
5 responsibilities, duties, acts and omissions of the  
6 defendants as distributors; is that right?

7 A. Right.

8 MR. LIVINGSTON: Leading. Objection,  
9 leading.

10 Q. (BY MS. KNIGHT:) Is that still the  
11 case?

12 A. Yes, it is.

13 Q. Are your opinions regarding Giant  
14 Eagle contained in your report?

15 MR. LIVINGSTON: Objection. Asked  
16 and answered.

17 A. Yes, they are.

18 Q. (BY MS. KNIGHT:) And do you stand by  
19 your opinions about Giant Eagle as set forth in  
20 your report?

21 MR. LIVINGSTON: Objection. Asked  
22 and answered.

23 A. Yes, I do.

24 Q. (BY MS. KNIGHT:) Did seeing one  
25 email with a held order change your opinions?



1 MR. LIVINGSTON: Objection, leading.

2 A. No, it did not.

3 Q. (BY MS. KNIGHT:) Mr. Rafalski, you  
4 were asked questions yesterday about whether you  
5 had opinions about whether pills had been diverted.  
6 Do you recall being asked a series of questions  
7 about that?

8 A. Yes, I do.

9 Q. Is your opinion in this case  
10 consistent with your prior testimony that if a --  
11 if methodology A flags an order as suspicious,  
12 given the defendants' lack of adequate due  
13 diligence, that those pills are more likely than  
14 not diverted?

15 MR. LIVINGSTON: Objection.  
16 Extremely leading.

17 A. Yes, I do.

18 Q. (BY MS. KNIGHT:) In your report, you  
19 have documents cited in footnotes, and you also  
20 have documents on your reliance list; is that  
21 right?

22 A. That's correct.

23 Q. Are the documents on your reliance  
24 list also documents that support your opinions?

25 A. Yes, they are.

1           Q.       So the absence of a footnote,  
2       including one of those reliance documents, would  
3       not indicate that it wasn't supportive of your  
4       opinions; is that fair to say?

5                   MR. LIVINGSTON:   Objection, leading.

6           A.       That would be an accurate statement.

7           Q.       (BY MS. KNIGHT:)   Do you recall being  
8       asked questions yesterday about some language that  
9       said I was informed in your CVS portion of your  
10      report?

11          A.       I'm sorry.   Could you say that one  
12      more time?   I'm sorry.

13          Q.       Yes, sir.   Do you recall -- I can  
14      direct you to it -- being asked questions, it is on  
15      Page 77 of your report where there's language that  
16      says "I have been informed of the random spot check  
17      of the orders flagged for additional review  
18      corresponds with orders shown in the IRR recaps."  
19      Do you recall those questions --

20          A.       I do recall that question, yes.

21          Q.       I just want to be certain.   Is it  
22      your testimony that you reviewed the records,  
23      confirmed what was reported to you and did not  
24      simply adopt something that was told to you by  
25      plaintiffs' counsel?

1 MR. LIVINGSTON: Objection, leading.

2 MR. RUIZ: Objection to the form.

3 (Off-the-record discussion.)

4 Q. (BY MS. KNIGHT:) You can answer,  
5 Mr. Rafalski?

6 A. Mr. Livingston -- I might have cut  
7 off Mr. Livingston if he wants to repeat that. I'm  
8 sorry.

9 Q. (BY MS. KNIGHT:) She got his  
10 objection. What she didn't get was your answer.

11 A. Yes, I did.

12 Q. (BY MS. KNIGHT:) You were asked  
13 questions yesterday and even some today about  
14 corresponding duties of pharmacists. Do you recall  
15 that?

16 A. Yes, I do.

17 Q. And you were also asked questions  
18 about why a corporate office for a pharmacy would  
19 be held responsible for the acts of itself and the  
20 pharmacy; do you recall that?

21 A. I do.

22 Q. Are you familiar with the CVS versus  
23 Holiday -- the Holiday case involves CVS?

24 A. I am.

25 Q. I am going to share my screen. Bear

1 with me. I apologize.

2 All right. Can everybody see Holiday  
3 CVS LLC, doing business as CVS Pharmacies?

4 A. It has not opened.

5 Q. Oh, sharing is paused.

6 THE REPORTER: Sharing is enabled  
7 from our end.

8 MS. KNIGHT: It says that it is  
9 paused.

10 THE REPORTER: Videographer, you want  
11 to go off the record?

12 THE VIDEOGRAPHER: Sure. We are off  
13 the record at 10:57.

14 (Whereupon, a break was had from  
15 10:57 a.m. until 10:59 a.m. EDT)

16 THE VIDEOGRAPHER: We are back on the  
17 record at 10:59.

18 MS. KNIGHT: Thank you.

19 Q. (BY MS. KNIGHT:) Okay.

20 Mr. Rafalski, now can you see the Holiday CVS LLC  
21 doing business as CVS Pharmacy?

22 A. I do.

23 Q. And this is published in the Federal  
24 Register; is that right?

25 A. That's correct.

1           Q.       In your experience, do the  
2 registrants monitor the Federal Register for  
3 decisions or opinions or for administrative actions  
4 by the DEA?

5                   MR. RUIZ: Objection. Calls for  
6 speculation and leading.

7           A.       I have experience that they routinely  
8 review these decisions. I don't have information  
9 if specific registrants did, but it is part of the  
10 industry, yes.

11           Q.       And do you see that this decision is  
12 from Friday, October 12th, 2012?

13           A.       I do.

14           Q.       And that would have been after you  
15 participated in issuing a letter of admonition to  
16 Walgreens and in the middle of your investigation  
17 of Masters; is that right?

18           A.       That's correct.

19                   MR. RUIZ: Objection, leading.

20           Q.       (BY MS. KNIGHT:) This is a very long  
21 opinion. I am going to go down -- okay. So on  
22 Page 25 of 31, can you read the highlighted  
23 section?

24           A.       At the end it is going to be blocked  
25 by the camera view, so if you move it to the very

1 top. "Agency precedence has consistently held that  
2 the registration of a pharmacy may be revoked as a  
3 result of an unlawful activity of the pharmacy's  
4 owner," and then "majority." And I cannot see if  
5 there's another word there.

6 Q. "Majority shareholders."

7 A. "Majority shareholders, officers,  
8 managing pharmacist or other key employee."

9 Q. Okay. If you will read the next  
10 highlighted section?

11 A. "In short, a pharmacist has a  
12 corresponding responsibility under federal law to  
13 dispense only lawful prescriptions, Liddy  
14 Pharmacies LLC, 76FR48887."

15 Q. You don't need to read those numbers.

16 A. "The corresponding responsibility to  
17 ensure the dispensing of valid prescriptions  
18 extends to the pharmacy itself."

19 Q. And do you see at the top of the next  
20 page that it says this is settled agency precedent?

21 A. I do.

22 MR. LIVINGSTON: I'm going to object  
23 to his reading just a decision. This is not proper  
24 questioning.

25 Q. (BY MS. KNIGHT:) My question is are

1     you familiar with that language?

2             A.       Yes, I am.

3             Q.       Do you agree with it?

4             A.       Yes, I do.

5                     MR. LIVINGSTON:  Objection, leading.

6             Q.       (BY MS. KNIGHT:)  You were asked  
7     yesterday whether you knew that Dr. Franklin told  
8     his customers not to go to Walgreens or Rite Aid.  
9     Do you remember those questions yesterday?

10                    MR. LIVINGSTON:  Objection.  
11    Mischaracterizes what he was asked about, and it is  
12    leading.

13             Q.       (BY MS. KNIGHT:)  Do you remember  
14    those questions yesterday?

15             A.       I remember that, yes.

16             Q.       Okay.  That topic?

17             A.       The topic.

18             Q.       All right.  I want you to assume for  
19    the sake of discussion that Walgreens and Rite Aid  
20    identified Dr. Franklin as a bad doctor, okay?

21             A.       Okay.

22             Q.       And they each decided to stop filling  
23    prescriptions that Dr. Franklin had written, okay?

24             A.       Okay.

25             Q.       All right.  And so the next thing

1     that happens is his customers go to an independent  
2     pharmacy to fill their prescriptions. All right?  
3     Are you with me?

4             A.       I am.

5             Q.       Now, that independent pharmacy is  
6     closed, and those customers go back to Walgreens  
7     and Rite Aid, and Walgreens and Rite Aid start  
8     filling Dr. Franklin's prescriptions again. Would  
9     that be an acceptable approach to Suspicious Order  
10    Monitoring System?

11            A.       It would not be.

12                   MR. RUIZ: Objection to the form of  
13    the question.

14                   THE REPORTER: I'm sorry, I didn't  
15    hear the whole answer. I just heard "it would --

16                   MS. KNIGHT: "Not be."

17            A.       It would not be.

18                   MS. KNIGHT: Are you ready,  
19    Ms. Nichols?

20                   THE REPORTER: Yes.

21            Q.       (BY MS. KNIGHT:) If Rite Aid and  
22    Walgreens maintained appropriate due diligence,  
23    should they be on notice that Dr. Franklin was a  
24    bad doctor?

25                   MR. LIVINGSTON: Objection, leading.



1           A.       Yes.

2           Q.       (BY MS. KNIGHT:) Is that an example  
3 of why it is important to maintain due diligence  
4 files?

5                   MR. LIVINGSTON: Objection, leading.

6           A.       That would be one of the primary  
7 reasons, that is correct.

8           Q.       (BY MS. KNIGHT:) Okay. Is it fair  
9 to say -- and I think that the term you used  
10 yesterday was historical data. What is the -- why  
11 is it important to maintain historical data for due  
12 diligence files, in particular?

13          A.       Well, it gives the -- in this case,  
14 the distributor to go back and look at the history  
15 of activity that occurred at a pharmacy. That way  
16 it is -- it doesn't require employees to just have  
17 a general recollection. And they look at a pattern  
18 of activity that may be indicative that there's a  
19 problem at the pharmacy. It just doesn't make  
20 sense, in general terms, to not keep any records  
21 and treat every investigation or review of a  
22 pharmacy as the first, without maintaining any  
23 long-term records.

24          Q.       If you didn't maintain long-term  
25 records and you hired a new pharmacist at your

1 pharmacy, how is that pharmacist going to know  
2 about the problems that had been previously  
3 identified, if there's no due diligence file?

4 MR. LIVINGSTON: Object to form.

5 A. Well, they wouldn't. But secondarily  
6 to that and specifically in the chains, they use  
7 multiple pharmacists -- I believe there's usually a  
8 primary, but there's always a lot of fill-in  
9 pharmacies. So it is easier to track the activity  
10 at each of the pharmacies relative to the  
11 pharmacist that that chain employs.

12 Q. Is that another way of saying that  
13 the defendants had institutional knowledge?

14 MR. LIVINGSTON: Objection to the  
15 form.

16 A. I guess that would be, yes.

17 Q. (BY MS. KNIGHT:) Okay.

18 A. They would have a greater width of  
19 knowledge because they are their pharmacies and  
20 their pharmacists and their pharmacy managers. So  
21 it definitely gives them a greater ability to  
22 maintain more comprehensive records by the nature  
23 of it being a chain.

24 Q. And as we have seen from the Federal  
25 Register, your opinions that pharmacies should be

1 held to account for the information that they have  
2 available to them is not a novel idea, is it?

3 A. It is not.

4 MR. LIVINGSTON: Object to form.

5 Q. (BY MS. KNIGHT:) You were asked  
6 questions yesterday and again today about whether a  
7 manual system for flagging suspicious orders could  
8 theoretically be an acceptable approach to  
9 identifying suspicious orders. Do you recall those  
10 series of questions yesterday and today?

11 A. I do recall those questions, and  
12 specifically it is not prohibited by the DEA to  
13 have a manual system.

14 Q. Would it be appropriate for any one  
15 of the five defendants, CVS, Walgreens, Rite Aid,  
16 Walmart or Giant Eagle, to use a manual system to  
17 identify suspicious orders?

18 A. No, it would not.

19 MR. LIVINGSTON: Objection. Asked  
20 and answered.

21 Q. (BY MS. KNIGHT:) In your report at  
22 Page -- I think it is 137. Let me just double  
23 check. Yes. At Page 137 of your report, this is  
24 specifically about Walmart.

25 You have that there was -- "the

1 distribution center filled orders of controlled  
2 substances for more than four thousand pharmacies  
3 over a four-day week."

4 Is there any set of circumstances  
5 under which it would be appropriate to have a  
6 manual system under those circumstances?

7 MR. LIVINGSTON: Object to the form.

8 A. No. That would be one of the primary  
9 reasons would be the volume of orders that are  
10 pulled on a daily basis.

11 Q. (BY MS. KNIGHT:) Are all of your  
12 opinions regarding the Suspicious Order Monitoring  
13 System for Walmart in your report accurate?

14 A. Yes, they are.

15 Q. Is there anything about the testimony  
16 or questioning yesterday or today that changed your  
17 opinions about Walmart?

18 MR. LIVINGSTON: Objection to the  
19 form.

20 A. No, there's not.

21 Q. (BY MS. KNIGHT:) Same questions  
22 about CVS, anything about the questioning or the  
23 documents that you saw yesterday or today that  
24 changed your opinions about CVS?

25 A. No, there is not.

1 MR. LIVINGSTON: Objection to the  
2 form.

3 Q. (BY MS. KNIGHT:) How about  
4 Walgreens, same question?

5 MR. LIVINGSTON: Objection to the  
6 form.

7 A. No, it did not.

8 Q. (BY MS. KNIGHT:) And last one, Rite  
9 Aid, any changes based on the documents that you  
10 have seen or the questioning yesterday and today?

11 MR. LIVINGSTON: Objection to the  
12 form.

13 A. No, it did not.

14 MS. KNIGHT: All right. I would like  
15 a quick five-minute break, and then I will see -- I  
16 just want to look through my notes and make sure I  
17 don't have any other questions for you.

18 THE VIDEOGRAPHER: We will go off the  
19 record at 11:09.

20 (Whereupon, a break was had from  
21 11:09 a.m. until 11:17 a.m. EDT)

22 THE VIDEOGRAPHER: We are back on the  
23 record at 11:17.

24 Q. (BY MS. KNIGHT:) Mr. Rafalski, just  
25 a little bit more from me.

1 Did you ask to review all of the due  
2 diligence that the defendants produced related to  
3 Lake and Trumbull County orders?

4 A. I did. Yes, I did.

5 Q. All right. Specifically, with  
6 respect to Walmart, do you recall receiving and  
7 reviewing a handful of spreadsheets, Excel  
8 spreadsheets?

9 MR. LIVINGSTON: Objection to the  
10 form.

11 A. I remember reviewing a few. I'm not  
12 sure exactly which ones we are speaking of.

13 Q. (BY MS. KNIGHT:) There was some --  
14 there was one about Know Your Customer, and there  
15 were a couple that had flagged orders identified.  
16 Do you recall those?

17 A. I do.

18 Q. And do you remember that there were  
19 notes next to some of those flagged orders?

20 MR. LIVINGSTON: Objection, leading.

21 A. I do.

22 Q. (BY MS. KNIGHT:) The spreadsheets  
23 that you saw that included flagged orders and  
24 explanations about those flagged orders, was that  
25 sufficient due diligence in your opinion?

1 MR. LIVINGSTON: Objection, leading.

2 A. No, it was not.

3 MS. KNIGHT: I don't have any other  
4 questions for you -- well, let me ask you one more  
5 question.

6 Q. (BY MS. KNIGHT:) Have all of your  
7 opinions that you have expressed been within a  
8 reasonable degree of probability or certainty?

9 A. Certainty, yes.

10 Q. All right. Oh, Mr. Rafalski, did you  
11 have a concern about testimony a little bit ago --  
12 concern is not the right word. Did you want to  
13 clarify something about your testimony about  
14 Relativity?

15 MR. LIVINGSTON: I am going to object  
16 to the form of the question.

17 MS. KNIGHT: I can ask him a better  
18 question.

19 Q. (BY MS. KNIGHT:) Did you use  
20 Relativity to run searches on your own more in the  
21 early stages of your investigation in these cases?

22 A. Yes. And specifically to that, to  
23 the series of questions, I don't have a real direct  
24 recollection of doing it for CT3 because of growing  
25 frustration.

1 I know that I relied predominantly on  
2 Mr. Elkins to do the searches, which I believe he  
3 did through Relativity. But I know I was answering  
4 questions on how I did searches, and I did do  
5 searches, but I don't recall it being specific to  
6 CT3 because I had other matters going. I just  
7 wanted to clarify that.

8 MS. KNIGHT: All right. I don't have  
9 any other questions for you now. I don't know  
10 whether anybody else does.

11 MS. MCENROE: The defendants are  
12 going to take a short break, and then we will be  
13 back.

14 THE VIDEOGRAPHER: We will go off the  
15 record at 11:20.

16 (Whereupon, a break was had from  
17 11:20 a.m. until 11:31 a.m. EDT)

18 THE VIDEOGRAPHER: We are back on the  
19 record at 11:31.

20

21 REEXAMINATION BY MS. MCENROE:

22 Q. Good morning, Mr. Rafalski. We met  
23 yesterday. I am Elisa McEnroe. I represent Rite  
24 Aid.

25 You remember a series of questions



1       that I had asked you?

2               A.       I do.    Good morning.

3               Q.       You were just previously asked some  
4       questions about plaintiffs' counsel, and there was  
5       a discussion about a term that was used about "bad  
6       doctor."   Do you recall that testimony?

7               A.       I do.

8               Q.       And I believe that term was maybe  
9       used yesterday as well from time to time in your  
10       testimony.   Is that a defined term under the DEA's  
11       regulations, as far as you know?

12              A.       Within the regulations, there is no  
13       bad doctor.   It is just a term that is used  
14       internally or in description.

15              Q.       Very briefly, what do you mean by  
16       that or understand that to mean?

17              A.       A bad doctor would be a doctor  
18       prescribing for no legitimate purposes or not  
19       having a proper doctor/patient relationship.  
20       Illicit prescribing would be a bad doctor.

21              Q.       A bad doctor could still have a DEA  
22       license to write prescriptions for controlled  
23       substances; is that fair?

24              A.       They would be.

25              Q.       And is it also fair to say that not

1 every single prescription written by what you think  
2 of as a bad doctor is necessarily an illegitimate  
3 prescription?

4 A. That is kind of a complex question.  
5 I think once, depending on the activity and  
6 behavior of a doctor, I guess there's always the  
7 possibility there's a legitimate prescription in  
8 there. Especially noncontrols. But it is  
9 difficult to make the assumption that once they are  
10 engaged in that activity that there's some  
11 sprinkled in. But I will acknowledge and concede  
12 it is a possibility.

13 Q. In fact, you would need to look at  
14 every prescription on a  
15 prescription-by-prescription basis to make that  
16 determination; is that fair?

17 A. I would probably need to look at more  
18 than just a prescription. If I was doing a case, I  
19 would look at the medical records also.

20 Q. If you were in the DEA's position and  
21 able to do that, correct?

22 A. Yes. I thought that is what we were  
23 speaking about.

24 Q. Sure. But a pharmacist looking at it  
25 would look at a prescription as it is presented to

1       them, prescription by prescription, correct?

2               A.       That is correct. They could follow  
3       up on it by calling the doctor, having a  
4       discussion. But, yes, the preliminary is just  
5       reviewing the written document.

6               Q.       You were asked a hypothetical about a  
7       Dr. Franklin and a series of circumstances going  
8       back and forth between different pharmacies and  
9       whatnot by plaintiffs' counsel. Do you remember  
10      that line of questioning?

11              A.       I do.

12              Q.       Do you know if any pharmacies  
13      actually tipped off the Ohio Board of Pharmacy with  
14      regard to Dr. Franklin and his practices?

15              A.       I do not have direct knowledge, but  
16      based on the level of activity, I am sure there was  
17      probably something that occurred in regards to a  
18      notification.

19              Q.       You are not giving any opinions in  
20      this case with regard to pharmacy practice, in any  
21      event; is that correct?

22              A.       That is correct. I was not asked to  
23      give an opinion on that specific activity.

24              Q.       Jumping to another line of  
25      questioning from plaintiffs' counsel, you were

1 asked a little bit about corresponding  
2 responsibility; do you remember that?

3 A. I do.

4 Q. Is there anything in your report  
5 about who owes a corresponding responsibility?

6 A. There is none. But I was asked  
7 questions about it, so I think that is why that  
8 garnered the questions. But I didn't provide that  
9 information in my report.

10 Q. Would you agree with me that the  
11 question of who owes a corresponding responsibility  
12 is a legal question? In fact, you were shown a  
13 legal case to read to talk about that question?

14 MS. KNIGHT: Object to form. It was  
15 actually a DEA administrative case.

16 Q. (BY MS. MCENROE:) Okay. I would  
17 still think that might be a legal case, but go  
18 ahead.

19 A. Yes. I wasn't commenting on the  
20 legal position. Just within the Federal Register,  
21 obviously it extends the activities of a pharmacist  
22 to a pharmacy. I think just that principle. I  
23 mean that is common to my employment because the  
24 registrant is always the focus, and the pharmacist  
25 is not a registrant. So it is just part of the

1 activity.

2 Q. Right. And the registrant is not the  
3 one filling the prescription, right, so it is the  
4 pharmacist that is filling the prescription?

5 A. Well, I think the pharmacy,  
6 ultimately with the authority of the registration,  
7 is filling the prescription. I think it is relying  
8 on the pharmacist to do that.

9 Q. So you think the pharmacy is  
10 exercising the professional duties of a pharmacist;  
11 the pharmacy went to pharmacy school, for example?

12 MS. KNIGHT: Object to form.

13 A. No. But I think the actual authority  
14 of dispensing controlled substances is under the  
15 DEA registration. If there was no registration,  
16 there would be no prescriptions dispensed.

17 I know that is kind of a  
18 chicken-or-an-egg kind of explanation. But it is  
19 just the activity first begins because a pharmacy  
20 has to have a DEA registration.

21 Q. (BY MS. MCENROE:) And in talking  
22 about who owes a corresponding responsibility, you  
23 are drawing on your understanding of what the law  
24 says about who owes the corresponding  
25 responsibility, correct?

1           A.       Yeah, I think we discussed that  
2 before. You just used the term "corresponding  
3 responsibility." As a DEA investigator, it goes to  
4 the regulation, I think it's 1306.04, that  
5 specifically talks about that. That is the crucial  
6 regulation which would allow me to take either a  
7 generally criminal action against a pharmacist.  
8 That is the nexus is the corresponding  
9 responsibility.

10           Q.       Jumping to another line of  
11 questioning from plaintiffs' counsel just a minute  
12 ago, you were asked a little bit about searches  
13 that you ran for your CT3 report, do you remember  
14 that?

15           A.       I do.

16           Q.       So would it be fair to say that in  
17 your opinions for Rite Aid and for Giant Eagle and  
18 for Walmart, who you first advanced in CT3, you did  
19 not run any searches yourself in Relativity?

20           A.       Yeah, I am drawing a blank on doing  
21 that. I have a lot of frustration with Relativity.  
22 I know I have used it again recently, same  
23 frustration. I know that I had a lot of  
24 interactions with Mr. Elkins searching for  
25 documents for me. That is actually faster and

1       easiest than me trying to do it myself.

2               Q.       Do you know, for example, if a search  
3       was conducted for the term "suspicious order" in  
4       Rite Aid's production to see what would come out  
5       for you to review?

6               A.       I don't know specifically if there  
7       would be a search. But in dealing with -- it has  
8       been four years now or three years of actively  
9       doing this, a lot of those searches and my needs I  
10      think are already well-known with Mr. Elkins. So  
11      most of my conversations now isn't to tell him just  
12      do a broad search of suspicious orders; it is more  
13      focused based on my review of records. That is a  
14      long answer.

15                    I don't know whether or not he did  
16      that. I did not direct him to just go in and do  
17      just the term "suspicious orders."

18               Q.       So you remember that line of  
19      questioning we talked through yesterday together,  
20      Mr. Rafalski, that set of documents, of emails  
21      between Rite Aid and from Liverpool Distribution  
22      Center and the DEA regarding not having any  
23      suspicious orders? You had mentioned that you had  
24      not seen those documents before.

25                    Do you know whether those are on your

1 Google Drive?

2 A. I do not.

3 MS. MCENROE: I am going to pass it  
4 to a co-defendant, Patrick. Are you there,  
5 Patrick? Maybe we should go off the record.

6 MS. KNIGHT: No. We need to stay on  
7 the record. We need to get this going.

8 MR. BEISELL: Absolutely. I agree,  
9 Kathleen.

10

11 REEXAMINATION BY MR. BEISELL:

12 Q. Hello, again, Mr. Rafalski. Just a  
13 couple of questions for you.

14 So you testified a minute ago that  
15 Walmart's manual system wasn't sufficient or  
16 appropriate in your opinion because of the volume  
17 of orders being shipped. Is that a fair summary?

18 A. Yeah, volume would be one reason.  
19 The other reason is it doesn't look at pattern and  
20 frequency. It just looks at size on a daily basis.  
21 That was not specific to volume, but that would be  
22 one of the main reasons. Volume in the amount of  
23 orders they're processing per day.

24 Q. Got it. What does manual mean to  
25 you?



1           A.       That means that the ultimate decision  
2       is made by a person in the act of pulling the  
3       actual order.

4           Q.       So a human individual decides whether  
5       or not this is a suspicious order, that is a manual  
6       system?

7           A.       It decides whether or not there's a  
8       trigger or there's a reason to stop or to make an  
9       alert. It wouldn't be to make ultimately a  
10      decision. It is just the system is based on a  
11      manual review versus a computer stopping or  
12      blocking an order.

13          Q.       Got it. What years did Walmart use  
14      the manual system you referred to?

15          A.       I would have to go to my report. I  
16      put away my little --

17          Q.       The notes from yesterday?

18          A.       Yes. Because each one used them for  
19      different time periods, I don't like to guess about  
20      that.

21          Q.       Sure. If you can quickly find your  
22      report, go ahead.

23          A.       Let me have my little timeline,  
24      instead of reading my report.

25          Q.       Sure.

1           A.       I have so many books here, I don't  
2       know that I have it.

3                    I have some recollection that they  
4       used it even into the REDDWERKS system. It was  
5       also a part of their SOMS. So I don't know that  
6       that I have a definitive date when it actually was  
7       terminated. I remember -- I have some recollection  
8       that there was a representation that it was  
9       occurring much greater than just when the REDDWERKS  
10      kicked into place, that it was still ongoing, that  
11      they would utilize employees to look at orders as  
12      they were processing them. So I don't know an  
13      exact ending date for that.

14           Q.       So based on what you told me, then,  
15      it would be fair to say that the manual system  
16      wasn't always the only system in place?

17           A.       Correct. What I am saying is that  
18      when the REDDWERKS went into place, which was  
19      computer based, they -- I believe that they also  
20      were relying on -- still relying on the pickers to  
21      manually look at orders.

22           Q.       And those pickers that you just  
23      mentioned, do you know how many pickers worked at  
24      the DC analyzing those orders on a daily basis?

25           A.       I recall it was discussed in the

1 deposition, but I don't recall it off the top of my  
2 head. I believe it was a smaller number. And just  
3 for clarification --

4 Q. Yeah.

5 A. -- the manual system there in -- I  
6 believe if I remember correctly with Walmart in the  
7 deposition, there was also some printing process of  
8 orders where I believe they identified some  
9 clerical workers, too, as part of the manual  
10 process.

11 Q. Can you explain that process to me a  
12 little bit more?

13 A. Yeah, I think they had a process  
14 early on where the orders came to the DC, and there  
15 were some clerical people that helped prepare the  
16 picking orders or I believe there was some  
17 testimony from maybe Mr. Abernathy that he also  
18 relied on some clerical people to look at orders.

19 Q. You mean on preparing the 222 forms?

20 A. Yes. It wasn't clear how they  
21 actually did that. He kind of indicated they  
22 printed something. It wasn't specific to an order  
23 form, so I don't know if it was a pick order or a  
24 customer order. But there was -- I recall he  
25 talked about some employees in the clerical that

1 also were part of the process.

2 Q. Understood. You said a minute ago  
3 when I asked you if you knew how many pickers were  
4 working on the manual review, you said a smaller  
5 number?

6 A. Yeah. I don't remember exactly  
7 because most all the defendants used it at one  
8 point or time. It was -- I don't want to guess.  
9 But it was an extensive number of employees.

10 Q. Do you know how big Walmart's  
11 Distribution Center 6045 is?

12 A. Square footage, I do not.

13 Q. You see 6045 as the one that  
14 distributed CT2s, correct?

15 A. That's correct.

16 Q. And that is the only one that  
17 distributed CT2s?

18 A. Correct.

19 Q. You agreed yesterday that DEA had  
20 several occasions to review Walmart's distribution  
21 practices over the course of the time covered in  
22 your report; do you remember that?

23 A. I would expect that, yes.

24 Q. So you did testify to that yesterday?

25 A. Yes.

1           Q.       Did you review any of the DEA-6  
2 reports reflecting the cyclic audits that DEA  
3 conducted of Walmart's DC 6045?

4           A.       I did not.

5           Q.       Do you recall any criticism by the  
6 DEA during the relevant time period about Walmart's  
7 manual system?

8           A.       Yeah, I believe there was some  
9 criticism in 2010, based on an inspection. And  
10 then there was another one in 2014.

11          Q.       And those were not DEA-6 reports, I  
12 take it, since you just said you didn't review  
13 them?

14          A.       No, I believe they were  
15 communications or emails within the company on both  
16 occasions.

17          Q.       And those emails, to your  
18 recollection, were criticisms by the DEA about the  
19 manual system?

20          A.       Oh, I'm sorry. I didn't understand  
21 it to be the manual system.

22          Q.       Yep.

23          A.       I don't remember specifically what  
24 they were about. I know it was issues with the  
25 SOMS or the identification of customers or maybe

1 even due diligence. But I just know that there was  
2 some preparations for reporting back to the DEA on  
3 certain topics and at the time frame.

4 Specifically in '14, I did a lot of  
5 searching for documents to supplement the original  
6 email. I have recollection of both of those.

7 Q. Understood. Let me reask my question  
8 since we didn't quite meet there.

9 So you don't recall any criticism by  
10 the DEA during the relevant time period covered in  
11 your report about Walmart's manual system?

12 A. I don't believe the two -- I didn't  
13 understand your question to be specific to that. I  
14 don't recall anything -- any criticism I reviewed,  
15 and I don't recall those emails being in regards to  
16 the manual system.

17 Q. Thanks. Just a couple more  
18 questions.

19 You mentioned or Ms. Knight asked you  
20 about some spreadsheets related to Walmart. Do you  
21 recall that?

22 A. Yes.

23 Q. And how many spreadsheets do you  
24 think there were, specific to her question?

25 A. I think there were four.

1           Q.       There were four? Okay. And in your  
2 mind, that is the sum total of Walmart's due  
3 diligence records for Track 3?

4                   MS. KNIGHT: Objection to form.

5           A.       No. I wouldn't say that is exclusive  
6 of their due diligence. Just through conversation,  
7 I am aware that there may be more information in  
8 ARCHER. And I don't know -- I believe those  
9 spreadsheets might be a production from ARCHER.  
10 But by the content of some of the testimony and  
11 documents, it seems like there should be more  
12 information in ARCHER, and I just haven't been able  
13 to find that.

14           Q.       (BY MR. BEISELL:) Understood.  
15 Several times today, I am sorry for repeating, but  
16 several times today you said that you relied -- all  
17 of the documents that you relied on for the  
18 opinions in your report are contained either in  
19 your report or in your reliance materials, right?

20           A.       Yes, sir.

21           Q.       If a document doesn't exist in your  
22 reliance materials or in your report, then you  
23 didn't rely on it for your opinions, right?

24           A.       That would be a correct assumption,  
25 yes, sir.

1           Q.       The inverse of the question I just  
2 asked, right?

3           A.       Yes.

4           Q.       So bear with me while I do a little  
5 bit of a hypothetical with you since I don't have a  
6 whole lot of time. So I am going to show you my  
7 screen here. Can you see my screen, Mr. Rafalski?

8           A.       I do.

9           Q.       And this is your Schedule I, your  
10 list of reliance materials?

11          A.       It is.

12          Q.       Okay. Now, hypothetically if one of  
13 those spreadsheets, say, the order monitoring data,  
14 if one of those spreadsheets had a Bates label of  
15 286240, if I put this in, it should appear  
16 somewhere in your reliance materials or in your  
17 report, right, if you reviewed that document and  
18 you relied on it for your opinions?

19          A.       Yeah.

20                   MS. KNIGHT: Objection to the form.

21          A.       Yes, it should.

22          Q.       (BY MR. BEISELL:) Okay. So I am  
23 just going to click here and see if we can find it.  
24 So it is not there, as far as I can tell.

25                   And we will try in your report. Bear



1 with me. Also not there.

2 So hypothetically if the Bates number  
3 286240, the Walmart-produced document, was one of  
4 those spreadsheets and it doesn't appear to be in  
5 your report or in your Schedule I, then you didn't  
6 rely on it for your opinions; is that fair?

7 MS. KNIGHT: Objection to the form.

8 A. That could be one explanation or it  
9 just didn't make it onto the reliance sheet. But I  
10 think that is a fair assumption.

11 MR. BEISELL: I don't have any other  
12 questions unless Scott or any of the other -- my  
13 other colleagues do.

14 MR. LIVINGSTON: How much time is  
15 left?

16 MS. KNIGHT: It looks like one  
17 minute.

18 MS. MCENROE: I thought --

19 MS. KNIGHT: I've used nineteen  
20 minutes, and we came back at 11:31.

21 MS. MCENROE: I did quick, mental  
22 math. I think you are right. I think you have got  
23 one minute.

24 MR. LIVINGSTON: I don't have any  
25 questions.

1 MS. MCENROE: Unless I am wrong, I  
2 think that concludes the deposition for today.

3 MS. KNIGHT: Thank you, all. I have  
4 a question before we go off the record. We have  
5 all of these documents here. Do you want to send  
6 FedEx shipment labels to us to send them back to  
7 you, or do you want us to destroy them, or what do  
8 you want to do?

9 MS. MCENROE: Shred them, please.

10 MS. KNIGHT: Okay.

11 MR. RUIZ: Destroy.

12 MS. KNIGHT: You got it.

13 MR. LIVINGSTON: Kathleen, I am fine  
14 with you just destroying those.

15 A. For Ms. Swift, if you could let her  
16 know --

17 MS. KNIGHT: I told her last night.

18 A. Okay. Never mind.

19 MS. MCENROE: Thank you so much,  
20 Mr. Rafalski. Thank you, everybody.

21 MR. BEISELL: Thank you, everybody.

22 A. Thank you very much.

23 THE VIDEOGRAPHER: We are off the  
24 record, 11:50.

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(Deposition concluded at 11:50 a.m. EDT)

FURTHER THE DEPONENT SAITH NOT

C E R T I F I C A T E

STATE OF ALABAMA  
JEFFERSON COUNTY

I hereby certify that the above and foregoing deposition was taken down by me in stenotypy, and the questions and answers thereto were reduced to typewriting under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing, to the best of my ability.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.



/s/ LAURA H. NICHOLS

Commissioner-Notary Public, State of AL

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Veritext Legal Solutions  
1100 Superior Ave  
Suite 1820  
Cleveland, Ohio 44114  
Phone: 216-523-1313

June 17, 2021

To: Kathleen Knight

Case Name: National Prescription Opiate Litigation - Track 3 v.

Veritext Reference Number: 4637239

Witness: James Rafalski , Vol. II      Deposition Date: 6/11/2021

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to [production-midwest@veritext.com](mailto:production-midwest@veritext.com).

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,  
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW  
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 4637239

CASE NAME: National Prescription Opiate Litigation - Track 3

DATE OF DEPOSITION: 6/11/2021

WITNESS' NAME: James Rafalski , Vol. II

In accordance with the Rules of Civil  
Procedure, I have read the entire transcript of  
my testimony or it has been read to me.

I have made no changes to the testimony  
as transcribed by the court reporter.

\_\_\_\_\_  
Date James Rafalski , Vol. II

Sworn to and subscribed before me, a  
Notary Public in and for the State and County,  
the referenced witness did personally appear  
and acknowledge that:

They have read the transcript;  
They signed the foregoing Sworn  
Statement; and  
Their execution of this Statement is of  
their free act and deed.

I have affixed my name and official seal

this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expiration Date

DEPOSITION REVIEW  
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 4637239

CASE NAME: National Prescription Opiate Litigation - Track 3

DATE OF DEPOSITION: 6/11/2021

WITNESS' NAME: James Rafalski , Vol. II

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).

I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

\_\_\_\_\_  
Date

\_\_\_\_\_  
James Rafalski , Vol. II

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;  
They have listed all of their corrections in the appended Errata Sheet;  
They signed the foregoing Sworn Statement; and  
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expiration Date

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ERRATA SHEET  
VERITEXT LEGAL SOLUTIONS MIDWEST  
ASSIGNMENT NO: 4637239

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\_\_\_\_\_  
Date James Rafalski , Vol. II  
SUBSCRIBED AND SWORN TO BEFORE ME THIS \_\_\_\_\_  
DAY OF \_\_\_\_\_, 20\_\_\_\_ .

\_\_\_\_\_  
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\_\_\_\_\_  
Commission Expiration Date



[&amp; - 303]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.



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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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